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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928

No. 418

A. B. HALE, AS CHAIRMAN, AND E. A. McCOLSKEY ET AL., ETC., APPELLANTS,

vs.

BIMCO TRADING, INC., AND BROWARD COUNTY PORT AUTHORITY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA

FILED OCTOBER 15, 1928.

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[fol. a]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BIMCO TRADING, INC., a Corporation, and BROWARD COUNTY PORT AUTHORITY, a Public Corporation, Plaintiff,

vs.

A. B. HALE et al., as and Constituting the State Road Department of the State of Florida, Defendants

BILL OF COMPLAINT—Filed November 4, 1937

[fol. 1] Bimco Trading, Inc., a corporation, brings this Bill of Complaint against A. H. Hale as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins as and constituting the State Road Department of the State of Florida, and thereupon the plaintiff complains and says:

1. That it is a corporation organized and existing under and by virtue of the laws of the State of New York, and that it is a citizen and resident of said State.

2. That the defendants and each of them are citizens and residents of the State of Florida.

3. That at the last session of the legislature in 1937 the legislature of the State of Florida passed a certain act known as Senate Bill #760 providing for the alleged inspection of cement imported and brought into the State of Florida from any foreign country. A copy of which act is attached hereto and marked "Exhibit A" and made a part hereof for all purposes.

4. That the Plaintiff is an importer of cement from the Kingdoms of Denmark and Belgium; that the cement so imported by it is imported in original packages or containers which are heavy six (6) ply paper bags containing ninety-four (94) pounds net of cement, and that the cement so imported by it is manufactured by Aalborg Portland Cement Works of Aalborg, Denmark, and by the Obourg Portland Cement Works of Obourg, Belgium, and that both Companies have been shipping cement into the State of Florida for many years last past, and that the Aalborg

Portland Cement Works, in particular, has been so shipping cement into the State of Florida ever since 1892.

[fol. 2] 5. That the cement of said Companies, so imported by the plaintiff, is of a high quality and grade; that the minimum standard set up by the act in question is that of the American Society of Testing Materials which requires that cement shall be able to stand a minimum tensile strength test of two hundred seventy-five pounds per square inch after seven days, whereas the cement imported by the plaintiff to be sold in the State of Florida will test from three hundred thirty-eight to four hundred thirty pounds per square inch, and that no cement sold in the State of Florida is of higher or better grade than that manufactured and sold by the plaintiff.

6. That all cement sold by the plaintiff in the State of Florida complies in all respects with the standards set up by the said act and has been so complying for the past forty years or more.

7. That during said period it has imported into the State of Florida many millions of sacks of cement and that its cement is used by many persons, firms, corporations and dealers. That the cement which it ships into the State of Florida, notwithstanding its high grade and character, sells for a less price than any cement manufactured in the State of Florida, and consequently it is attractive to purchasers who can get a high grade of cement at a less price, and that consequently the importation of such cement is of great benefit to citizens and residents of the State of Florida, and is marketed in Florida at a price of $1.60 per barrel.

8. That the cost of ocean freight or transportation and terminal charges is seventy cents per barrel and that it is required to pay a tariff or duty of seventeen cents per barrel, leaving it the sum of Seventy-three cents out of which to pay the cost of manufacture, overhead and profit.

9. That the inspection charge of fifteen cents per hundred weight, as imposed by the term of this act, would require it to pay the sum of Fifty-seven cents additional, per barrel [fol. 3] and would leave it only sixteen cents to cover the cost of manufacturing and overhead, and the cost of manufacturing and overhead far exceeds sixteen cents per barrel, and consequently the effect of such act, if enforced, would

be to permanently prevent the plaintiff from shipping said cement into the State of Florida and would be denying to it the equal protection of the laws of the United States of America.

10. That for many years whenever required, inspection of cement shipped into the State of Florida by the plaintiff and persons, firms and corporations representing other cement manufacturers have been inspected by laboratories such as the Southern Analytical Laboratory of Jacksonville, and Nutting Laboratories of Miami, Florida.

11. That such persons and laboratories charge a regular fee of from Twelve Dollars and 50/100 ($12.50) to Fifteen Dollars ($15.00) to make a test of a shipload of cement, and the plaintiff's cement comes in only in ships and not otherwise.

12. That such a charge is applicable whether a ship brings in a cargo of one hundred tons or of three thousand tons.

13. That for example, a cargo of three thousand tons contains approximately eighteen thousand barrels of cement; that the cost of inspection heretofore paid by the plaintiff has not exceeded Fifteen Dollars ($15.00) per cargo, but that under the so-called inspection charge fixed by the provisions of the said act the actual cost of inspecting a three thousand ton cargo in accordance with the provisions of said act would be Nine Thousand Dollars ($9,000.00) which is so excessive as to constitute confiscation and that in truth and in fact the so-called inspection fees prescribed by said act are sixty times the actual cost of inspection made in accordance with the provisions of said act and Six Hundred times the necessary and customary cost of inspection as is now and, for many years last past, has been made in the cement industry in Florida.

[fol. 4] 14. That the purpose of the act is not, in any sense, to protect the citizens of Florida against cement which is inferior in quality, and its purpose is not to prevent the purpetration of a fraud on the people of Florida, but on the contrary, its purpose is to benefit a concern known as the Florida Portland Cement Company which manufactures cement at Tampa, Florida, and is the only concern so manufacturing coment in the State of Florida.

15. Plaintiff further alleges that the defendants are, under the laws of the State of Florida, given funds which are derived from taxation by the State of the Citizens and residents of the State of Florida solely for the construction, operation and maintenance of highways and bridges within the State of Florida. That such funds if used for another purpose would constitute a misappropriation thereof and would subject the defendants to penalties under the laws of the State of Florida.

16. That the act in question provides that it shall use and expend in endorcing said act only monies derived and collected thereunder.

17. That the plaintiff at the time of the passage of this act had, and still has, contracts with citizens of the State of Florida for the sale of the cement so imported, and to be imported by it and that the so-called inspection tax imposed by the provisions of said acts is so excessive and oppres-ive that the plaintiff cannot afford to import any cement or pay the cost of such so-called inspection and that it will lose all of its contracts and all of the profits it might otherwise make, the amount of which it is wholly impossible to estimate and the plaintiff alleges that the act, therefore, infringes on the plaintiff's right to contract with citizens of the United States to its great and irreparable injury.

18. Plaintiff Further Alleges that said act is unconstitutional and void and in violation of the Constitution of the United States of America in the following respects:

[fol. 5] (a) That it levies a tax on commerce between the United States and foreign countries and constitutes, as such, a direct burden on such commerce in violation of Article 1, Section 8, of the Constitution of the United States of America.

(b) That it likewise prohibits the importation in the State of Florida of a legitimate article of commerce, also in violation of Article 1, Section 8, of the Constitution of the United States of America.

(c) That it denies to the plaintiff and others, similarly situated, the equal protection of the law in violation of the fourteenth amendment to the Constitution of the United States of America.

(d) That it levies an impost or duty under the misnomer of an inspection law in direct violation of Article 1, Section 10 of the Constitution of the United States of America.

(e) That it likewise infringes on the right of contract guaranteed by the fourteenth amendment to the Constitution of the United States and is in violation thereof.

That the defendants have announced that they propose to immediately enforce said act and they have appointed, or are about to appoint, an inspector for that purpose and the enforcement of said act will prevent the plaintiff from making any sales of its cement whatever in the State of Florida and cause its contracts in said State to be broken to its immediate and irreparable injury.

Wherefore the Plaintiff Prays that this Court will enter a temporary restraining order restraining the defendants from the enforcement of this act until a hearing can be had on its constitutionality, and until a further order of this Court, and that it will hereafter issue a writ of injunction, both temporary and final, enjoining and restraining the defendants, their servants, agents or employees from enforcing, or attempting to enforce the said act and that they may have such other relief as may be proper.

[fol. 6] And the Plaintiff will ever pray, etc.

Martin H. Long, Solicitor for Plaintiff.

Duly sworn to by Carl W. F. Grimmelman. Jurat omitted in printing.

[fol. 7] EXHIBIT "A" TO BILL OF COMPLAINT

Senate Bill No. 760

A Bill to be Entitled:

An Act providing for the fixing of a minimum standard for all cement offered for sale, sold or used in the State of Florida and to authorize and empower the State Road Department of the State of Florida to write rules and regulations for the effectual enforcement of this Act: Providing for the inspection of all cement imported and brought into the State of Florida from any foreign country and providing for an inspection fee to be paid for the inspection

of all cement imported and brought into the State of Florida from any foreign country and offered for sale, sold, or to be used in the State of Florida: Providing penalties for the violation of any of the provisions of this Act as well as any rule or regulation promulgated by the State Road Department: And providing for the enforcement of the provisions of and regulations made in pursuance of this Act.

Whereas, during the past twelve months approximately thirty per centum (30%) of all cement sold and used in Florida was manufactured in foreign countries and imported and brought into the State of Florida, and,

Whereas, in view of the fact that large numbers of dwellings, apartment house-, hotels and public buildings are constructed of cement or cement forms an integral part of the construction thereof, and,

Whereas, it is of Paramount Importance to the Public safety that only cement measuring up to a minimum standard should be offered for sale, sold or used in the State of Florida, and,

Whereas, much of the foreign manufactured cement imported and brought into the State of Florida has been of inferior quality, and

Whereas, the importation and sale or use of foreign cement not — jeopardizes public safety but amounts to unfair competition being forced on this great industry in Florida,

Therefore:

Be it enacted by the Legislature of the State of Florida.

Section 1. That the State Road Department of the State of Florida is hereby authorized and required to fix a minimum standard for all cement offered for sale or sold or used in the State of Florida; said standard to be fixed by said State Road Department shall be the standard now in force and used by it in the purchase and use of cement in [fol. 8] the construction of public highways, which said standard of cement was set up by the American Society of Testing materials and approved by the United States Bureau of Public Roads for highway construction; and said standard is hereby fixed and designated as a minimum for all cement offered for sale or sold or used in the State of Florida, and it shall be unlawful for any person, persons, association of persons, firm or corporation to sell, offer for

sale or use in the State of Florida any cement in the construction of any hotel, apartment house, rooming house, dwelling or public building of any kind or character which does not measure up to the minimum standard herein fixed.

Section 2. It is hereby made the duty of the State Road Department to inspect all cement imported or brought into the State of Florida from any foreign country and sold or offered for sale or to be used in the State of Florida, and no cement imported and brought into the State of Florida from any foreign country shall be sold, offered for sale or used in the State of Florida, until the same has first been inspected by the State Road Department and a tag or other evidence showing such inspection shall be affixed to said cement, or the container thereof, showing that it has been so inspected or approved; and it shall be unlawful for any person, firm association of persons or corporation to sell, offer for sale or use in the State of Florida, any cement imported or brought into the State of Florida from any foreign country before such inspection has been made by the State Road Department and such cement approved as herein set out and until there has been paid an inspection fee to the State Road Department of fifteen cents (15¢) on each one hundred pounds or fraction thereof; said fee so required to be paid for inspection of cement manufactured in a foreign country and imported and brought into the State of Florida shall be paid to the State Road Department and said inspection fee is required to be paid as inspection fees on cement imported and brought from foreign countries into the State of Florida.

[fol. 9] Section 3. The State Road Department is hereby authorized to employ all field and other agents and clerical assistance at such times and periods as may enable it to enforce the provisions of this Act, and is hereby authorized to fix their compensation and the said State Road Department is hereby authorized to purchase and install such facilities from time to time as it may deem necessary to make fully effectual the provisions of this act, The State Road Department shall use and expend in enforcing this act only monies derived and collected hereunder.

Section 4. Said State Road Department is hereby authorized and empowered to promulgate any and all reasonable rules and regulations that it may deem necessary and proper

for the proper administration and enforcement of this Act and said rules and regulations shall have the force and effect of law.

Section 5. It shall be unlawful for any person to obstruct or resist any authorized agent or inspector designated by the State Road Department while such person is in the performance or discharge of any duty imposed upon, authorized or required under the provisions of this act, or by any rule or regulation adopted as provided hereunder.

Section 6. Any person who shall violate any of the provisions of this Act or shall do or commit any act herein declared to be unlawful or violate any rule or regulation made or promulgated by the State Road Department by virtue of the authority herein, shall be punished by a fine of not more than $2500.00, or imprisonment in the county jail for not more than 12 months, or both in the discretion of the court.

Section 7. This law shall be construed as an Act intending to secure public safety of the people of the State of Florida.

Section 8. The State Road Department is hereby authorized to designate and utilize the services of the several officers and inspectors of the Health Department, Hotel Commission of the State of Florida, as well as any and all other duly authorized and legally constituted officials who are vested with police power, in order to enforce and carry out the provisions of this Act in all particulars, and it shall be the duty of all such inspectors and other officials to com- [fol. 10] ply with the orders and requests of said Road Department in connection with the enforcement of this Act, without any additional compensation than that already being paid such inspector or officials, and refusal so to do on the part of any inspector or official shall constitute legal and sufficient grounds for removal from office.

Section 9. In addition to other remedies provided for in this Act, the State Road Department is hereby authorized to proceed in any of the courts of this State by injunction to restrain any threatened continued violation of this Act, and it shall be the duty of each State Attorney, County Prosecuting Attorney and of the Attorney General, to assist in the enforcement of the provisions of this Act upon request of the State Road Department.

Section 10. All laws and parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed.

Section 11. This act shall take effect upon its becoming a law.

[fol. 11] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF A. B. HALE—Filed November 9, 1937

Personally came before me the undersigned officer, duly authorized to administer oaths, A. B. Hale, who being first duly sworn deposes and says that he is one of the Respondents named in the above styled cause, and is Chairman of the State Road Department of the State of Florida; that deponent has caused an investigation to be made for the purpose of determining what the cost will be for conducting and carrying out the inspection of cement manufactured in foreign countries and imported in Florida as provided for in the Act of the 1937 session of the Florida Legislature, known as Senate Bill No. 760, and which is under attack in the above styled proceeding; that such investigation shows, and it is the opinion of the deponent that 15¢ per hundred pounds as levied and provided in said Act as the inspection fee will be absolutely necessary to defray all of the expenses incident, essential and necessary to conduct and carry out the inspection as provided in said Act. That up to the present time, said Act has not been put in operation and said Act will not be put in operation until peremptory mandamus is issued in the Supreme Court of Florida in the mandamus proceedings pending in said Court involving said Act.

Arthur B. Hale.

Sworn to and subscribed before me this 8th day of November A. D. 1937. Geraldine Lesley, Notary Public State of Florida at Large. My commission expires Feb. 28, 1941. (Official Seal.)

[fol. 12] On the 9th day of November A. D. 1937, the defendants filed a certified copy of the pleadings and opinion of the Supreme Court of Florida, in the case of State of Florida, ex Rel. Florida Portland Cement Company, a cor-

poration, vs. A. B. Hale, as Chairman, et al., in the words and figures following, to wit:

IN SUPREME COURT OF FLORIDA

ORDER OF ALTERNATIVE MANDAMUS

State of Florida to A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brocks W. Bateman and James W. Perkins, as and Constituting the State Road Department of the State of Florida:

Whereas, the State of Florida, upon the relation of Florida Portland Cement Company, a corporation, as relator, has filed its petition for mandamus in the Supreme Court of the State of Florida, and alleges in said petition

First. That relator is a resident and taxpayer of the State of Florida, with its home office located at Tampa, and is engaged in the State of Florida in the business of manufacturing and selling cement for use in the State of Florida in the construction of dwellings, apartment house-, hotels, public buildings, etc., and

Second. That the respondents, A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James E. Perkins, as members, constitute the State Road Department of the State of Florida;

Third. That at the 1937 session of the Legislature there was duly, legally and regularly introduced and passed in accordance with the Constitution of Florida, in the Senate of said State, a bill providing for the establishment in Florida of a minimum standard for all cement offered for sale, sold or used in the State of Florida, requiring that the State Road Department inspect all cement imported and [fol. 13] brought into the State of Florida from any foreign country and requiring the State Road Department to collect an inspection fee for the inspection of all cement imported and brought into the State of Florida from any foreign country and offered for sale, sold or used in the State of Florida; providing penalties for the violation of any of the provisions of said act, etc., a copy of which is attached to said petition; that said bill was duly, regularly and legally passed by the Senate, having been passed in accordance with all requirements of law and the constitution.

Fourth. That said bill, after its passage by the Senate was immediately thereafter duly, regularly and legally certified and transmitted from the Senate to the House of Representatives of the State of Florida, in a Senate message addressed to said House in the due, regular and legal manner; that thereafter the House of Representatives of the State of Florida duly, regularly and legally passed said bill in accordance with the requirements of law and the Constitution; that all of the proceedings and actions taken by both the Senate and House of Representatives appear of record as entered in the Journals of the respective bodies and said entires show that said bill was legally and constitutionally adopted and passed by both of said bodies; that after its adoption and passage by the House, said bill was duly and properly enrolled and was duly, regularly and legally signed by the President of the Senate, as well as the Secretary of said body, and also by the Speaker of the House of Representatives and the Clerk of said body.

Fifth. That said bill, after being thus duly, regularly legally and constitutionally passed, adopted, enrolled and signed, the same was ful-y, legally and regularly, as provided in the Constitution, presented to and laid before the Honorable Fred P. Cone as Governor of the State of Florida on the 30th day of May A. D. 1937, while both Houses were in session.

[fol. 14] Sixth. That thereafter, to wit: on the 2nd day of June A. D. 1937, upon motion made by a Senator for that purpose, the Senate voted to recall said bill from the Governor; that after the adoption of said motion and on the same day, the Senate voted to return said bill to the Governor without having taken any action on the bill whatsoever, and that said bill was immediately in compliance with said vote of the Senate, returned to the Governor.

Seventh. That thereafter, to wit, on the 3rd day of June, A. D. 1937, the House of Representatives adopted a motion to recall said bill from the Governor's office; that on the 4th day of June A. D. 1937, being the same day on which said Legislature adjourned, sine die, the Governor returned said bill to the House of Representatives just prior to its adjournment; that the House took no action upon said bill whatsoever after the same was returned to it by way of amendment, reconsideration or otherwise, as disclosed by

the official Journal of said House; that said bill was in the possession and custody of the said House at the time of the adjournment of the Legislature sine die and the same was immediately transmitted and delivered as required by Section 16 Compiled General Laws of 1927, as well as by Article 4, Section 21, of the Constitution, by the Speaker of the House of Representatives to Honorable R. A. Gray as Secretary of the State of Florida, and that said bill has ever since said time been deposited and on file with said Secretary of State, and still is; that the said Honorable R. A. Gray as Secretary of State immediately notified the Honorable Fred P. Cone, as Governor, that said Act had been deposited with and was on file in his office and stated to the said Governor that if he desired said bill for any purpose he could secure the same by sending for it.

Eighth. That the Governor of Florida has never vetoed said Act and that the time within which he could exercise the right of veto has long since lapsed and that said Act [fol. 15] is and constitutes a valid enactment of the Legislature and is in full force and effect as a law of the State of Florida; that the Act of the House of Representatives in acting separately and alone in adopting the motion to recall said Act from the Governor and without any further action thereon, and the Governor's act in complying with said request of the House of Representatives was and is a nullity and did not in any wise affect the validity of said Act, particularly so when the Senate did not concur in said Act but on the contrary when it affirmatively appears that the Senate refused to concur in the recall of said Act by the House. The House was without authority to recall said bill without the concurrence of the Senate and especially where the Senate had positively and affirmatively refused to concur or agree to such recall as shown by the official Journal of the Senate.

Ninth. That notwithstanding the fact said Act constitutes a valid and constitutional enactment of the Legislature and is a valid law of the State of Florida, and notwithstanding the fact that said Act makes it the mandatory duty of the State Road Department to inspect all cement manufactured in a foreign country and imported from such country into Florida and offered for sale, sold or to be used in Florida, and collect a fee for such inspection, the respondents have refused and are still refusing and will continue to refuse

to enforce said Act unless required so to do by this Honorable Court, assigning as their reasons for so doing that said Act was not properly and constitutionally passed by the Legislature by reason of the matters and things hereinabove set out and respondents have assigned the additional reason for their refusal to enforce the same that said Act is unconstitutional because it levies a duty or impost upon foreign cement and is excessive and discriminatory.

Tenth. That there is absolutely no merit or legal justification whatsoever for the refusal of respondents to enforce said Act; that said Act was duly, legally and constitutionally passed and enacted and is duly, constitutionally [fol. 16] and legally the law of Florida and that the Legislature was authorized and empowered to enact said law under Article 2, Section 10 of the Constitution of the United States, which specifically gives to the State the right to impose or levy any imposts or duties on imports or exports, so long as the moneys derived therefrom are used for inspection purposes and any surplus left over shall be for the use of the Treasury of the United States, and such laws shall be subject to the revision and control of the Congress of the United States; so that the Legislature was vested with full authority to enact said law and relator alleges that the amount of impost or duty levied under the provisions of said Act of 15¢ per 100 pounds will be absolutely necessary to enforce and carry out the inspection of foreign manufactured cement imported into Florida as provided in said Act, and that no surplus will be derived from the imposition and collection thereof, but in the event a surplus should exist it will be held for the benefit of and turned over to the Treasury of the United States, and if it should later develope that said law should be revised, that is the exclusive function under the Constitution of the United States of Congress, and not of either the courts or the State Road Department of the State of Florida.

Eleventh. That the cement manufactured by relator in the State of Florida is being subjected to an inspection by the State Road Department under requirements and regulations in existence prior to the enactment of the law attached hereto, and that the relator's cement is required to conform to the standard prescribed by said Act attached hereto but that the State Road Department is refusing to

inspect cement manufactured in foreign countries which is imported into Florida and sold or used in Florida, notwithstanding said law mandatorily requires such inspection, and the State Road Department in its refusal to comply with the provisions of said law is permitting foreign manufactured cement to be sold and used in Florida which does not measure up to the minimum standard as prescribed and required by said Act.

[fol. 17] Wherefore, relator prays that this Honorable Court do issue its alternative mandamus directed to the respondents, A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of the State of Florida, requiring said respondents to show cause if any they can, on a day to be fixed by this Court, why this Honorable Court should not issue a peremptory mandamus requiring respondents as the State Road Department to inspect all cement imported into the State of Florida from any foreign country and sold, offered for sale, or to be used in the State of Florida, and affix thereto evidence showing that said cement has been so inspected and collect therefor the inspection fees fixed in said Act, as the same is on file and deposited with the Secretary of State, as well as carry out, perform and discharge all of the other provisions required under said Act to be done and performed by the said State Road Department.

This is, therefore, to command you, A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of the State of Florida, and each of you, to be and appear before the Supreme Court of Florida, at Tallahassee, on the — day of ——, A. D. 1937, at 10 o'clock A. M., and then and there show cause, if any you can, why peremptory mandamus should not issue as prayed.

Witness the Honorable W. H. Ellis, Chief Justice of the Supreme Court of the State of Florida, and the seal of said court.

(Signed) G. T. Whitneld, Clerk. (Seal of Court.)

(Said Bill # 760 of 1937 Legislature of the State of Florida, is omitted for the reason that same appears in this record on pages 7 to 10, inclusive.)

[fol. 18] IN SUPREME COURT OF FLORIDA

DEMURRER

Now comes respondents, A. B. Hale, as Chairman, and E. A. McColksey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of the State of Florida, and demur to the alternative mandamus issued by the Court in the above cause, and say that the same is bad in substance and insufficient in law and assign the following as grounds of demurrer intended to be argued to the Court.

First. That said alternative mandamus shows upon its face that the bill, which is made the basis of this action, did not legally and constitutionally become a law of the State of Florida and is not effective as a law.

Second. It affirmatively appears that said bill was not presented to the Governor by the Legislature pursuant to the mandatory provisions of Section 28, Article 3 of the Constitution of Florida.

Third. For aught that appears in the Alternative Writ it was within the discretion of the Governor as a matter of courtesy to return a bill, not yet a law, to one of the branches of the Legislative Department, and said bill not thereafter being returned or presented to the Governor by the Legislature, or by one of the branches thereof, during the Legislative Session, results in said bill not being presented to the Governor as required by Section 28, Article 3 of the Constitution.

Fourth. Regardless of antecedent circumstances the fact remains by the language of the alternative writ itself that at and before the adjournment of the Legislature said bill was in the custody and possession of the House of Representatives, and was not returned or presented to the Governor during the Session or at any time thereafter; but on the contrary was filed with the Secretary of State the same as other Legislative papers pursuant to Section 116, C. G. L. 1927.

Fifth. It affirmatively appears that these proceedings amount to an attempt to use the power of the Courts to declare a bill to be enacted into law in the face of cricumstances indicating that the Legislative Department had acted while

in Session to prevent the bill from becoming a law by with-
[fol. 19] drawing it entirely from Executive consideration.

Sixth. For aught that appears in writ it is within the discretion of the Governor, and such discretion is not within the control of the Courts, to return a bill not yet a law to one of the branches of the Legislative Department for further disposition.

Seventh. That said alternative writ of mandamus shows upon its face that said purported Act is unconstitutional for the reason that it is a levy by the State of an impost or duty upon a product imported into Florida from a foreign country, and the exclusive right to levy duty or impost is vested under the Constitution of the United States in the Congress.

Eighth. Said purported Act sought to be enforced as law is unconstitutional for the further reason that it is discriminatory in that it imposes an impost or duty in the form of inspection fees upon imported cement from foreign countries and does not require the payment of any inspection fees on domestic cement.

Ninth. The title of said bill violates Section 16, Article 3, of the Constitution of Florida in that it contains more than one subject and matters properly connected therewith, viz; (1) fixes a minimum standard on all cement offered for sale in the State of Florida regardless of where manufactured, and (2) levies an impost or duty on all cement brought into the State from any foreign country and offered for sale in the State.

Tenth. Said bill arbitrarily interferes with the right to contract.

Eleventh. It affirmatively appears that the bill sets up no reasonable basis for fixing minimum standards for cement.

Twelfth. Said bill is discriminatory and violates Section I, Article XIV, Constitution of the United States in that it provides for inspection of foreign cement only.

Thirteenth. It manifestly appears that said bill tends to create a monopoly.

[fol. 20] Fourteenth. It affirmatively appears that the allegations of the alternative writ fail to show a clear legal duty which respondents may be compelled to perform.

(Signed) Fred H. Kent, Attorneys for Respondents.
State Road Department of Florida, (Signed) by Arthur B. Hale, Chairman.

I, the undersigned attorney for respondents in the above cause, do hereby certify that in my opinion the foregoing demurrer is well founded and grounded in point of law.

(Signed) Fred H. Kent, Attorneys for Respondents.

IN SUPREME COURT OF FLORIDA

AMENDMENT TO RESPONDENTS' DEMURRER

Come now the Respondents and amend their Demurrer filed herein by adding thereto the following ground:

Fifteenth: The alternative writ shows on its face that Relator is not entitled to the peremptory writ prayed for.

(Signed) Richard P. Daniel, Attorney for Respondents.

IN SUPREME COURT OF FLORIDA, JUNE TERM, A. D. 1937

Tuesday, October 12, 1937

Original Jurisdiction Mandamus

ORDER OVERRULING DEMURRER, ETC.

This cause having been submitted to the Court upon the Demurrer of the Respondent to the Alternative Writ of Mandamus and upon Motion of Respondents to quash the Alternative Writ of Mandamus and upon briefs and argument of counsel for the respective parties and the Court being now duly advised in the premises, it is thereupon ordered and adjudged by the Court that the said Demurrer be overruled and that the said Motion to Quash the Alternative Writ be and it is hereby denied; it is further ordered by the Court that the Respondents be allowed ten days from

this date in which to file Answer or Return, in default of which Peremptory Writ will issue.

The Opinion of the Court in this cause prepared by Mr. [fol. 21] Justice Buford, was this day ordered to be filed.

IN SUPREME COURT OF FLORIDA, DIVISION A, JUNE TERM A. D. 1937

A case of original jurisdiction-mandamus.

Whitaker Brothers, for Relator;
Richard P. Daniel and Fred H. Kent, for Respondents.

OPINION—Filed October 12, 1937

BUFORD, J.:

This is an original proceeding in mandamus. Alternative writ was issued on July 27, 1937, to which the respondents have filed demurrer, which will be considered as motion to quash. The purpose of the writ was to coerce the State Road Department of the State of Florida to comply with the provisions of Senate Bill #760, which became a law when it was filed in the office of the Secretary of State on June 5, 1937. We quote the legislative act in full for the benefit of the bench and bar, as follows: (Said Act #760 is Omitted by Reason of the Fact that it Appears Heretofore in this Record on Pages 7 to 10, Inclusive.)

The particular act sought to be required by the State Road Department is "to inspect all cement imported into the State of Florida from any foreign country and sold, offered for sale, or to be used in the State of Florida, and affix thereto evidence showing that said cement has been so inspected and collect therefor the inspection fees fixed in said Act, as the same is on file and deposited with the Secretary of State, as well as carry out, perform and discharge all of the other provisions required under said Act to be done and performed by the said State Road Department." The language, "as well as carry out, perform and discharge all of the other provisions required under said Act to be done and performed by the said State Road Department" may be treated as surplusage because we hold that the Act only requires the State Road Department "to inspect all

cement imported into the State of Florida from any foreign country, and sold, offered for sale, or to be used in the State of Florida, and to affix thereto evidence showing that [fol. 22] said cement has been so inspected, and to collect therefor the inspection fees fixed by said Act as the same is on file and deposited with the Secretary of State." The State Road Department is authorized by the Act to do certain things but the provisions of the Act in regard to those other things which may be done by the State Road Department are directory and not mandatory.

The first ground of the demurrer is:

"First. That said alternative mandamus shows upon its face that the bill, which is made the basis of this action, did not legally and constitutionally become a law of the State of Florida and is not effective as a law."

The record shows that this ground is without merit because each and every provision of Section 17 of Article III of the Constitution of Florida was complied with. The record shows, however, that after the Act had been duly passed by both the Senate and the House and had been authenticated as required by the Constitution, it was transmitted to the Governor as an Act of the Legislature; that thereafter, the Governor, pursuant to the request of the House of Representatives, returned the Act to the House of Representatives. For what purpose or reason is not discussed by the record.

The record further shows that the Act was in due course filed and deposited with the Honorable R. A. Gray as Secretary of State by the Honorable McL. Christie as Speaker of the 1937 Session of the House of Representatives of the State of Florida on the 5th day of June, 1937.

Section 28, Article III of the Constitution of Florida, provides as follows:

Every bill that may have passed the Legislature shall, before coming a law, be presented to the Governor; if he approves it he shall sign it, but if not he shall return it with his objections to the House in which it originated, which House shall cause such objections to be entered upon its Journal, and proceed to reconsider it; if, after such reconsideration, it shall pass both Houses by a two-thirds vote [fol. 23] of members present, which vote shall be entered on

the journal of each House, it shall become a law. If any bill shall not be returned within five days after it shall have been presented to the Governor (Sunday excepted) the same shall be a law, in like manner as if he had signed it. If the legislature, by its final adjournment prevent such action, such bill shall be a law, unless the Governor, within ten days after the adjournment, shall file such bill, with his objections thereto, in the office of the Secretary of State, who shall lay the same before the Legislature at its next session, and if the same shall receive two-thirds of the votes present it shall become a law."

Courts of final appellate jurisdiction in this country are not in harmony in regard to the right of the legislature to recall an Act which has been duly passed and presented to the Governor. In some jurisdictions it is held that after a bill has passed both houses of the Legislature and has been sent to the Governor for approval, it is competent for the legislature to reconsider its vote on return of the bill to it from the Governor, at its request, such request being evidenced by a joint resolution to that effect. See Ensley v. Simpson, 166 Ala. 356, 52 Sou. 61, Robinson v. City of Ensley, — Ala. —, 52 Sou. 69.

In Baltimore Fidelity Warehouse Co. v. Canton Lumber Co., 118 Md. 135, 84 Atl. 188, it was held in effect that where a bill had passed both houses of the legislature and had been sent to the Governor for approval and was afterwards returned to one of the houses at its request in order that it might be amended, it was held that although the request for the return of the bill was not made by joint resolution of both houses of the legislature, the facts disclosed a concurrent action of both Houses in the request and that the legislature had jurisdiction to reconsider the bill. See also Teen v. State, 79 Texas Criminal Reports 285, 183 S. W. 1144; McKenzie v. Moore, 92 Ky. 216, 17 S. W. 483, 14 L. R. A. 251.

In other jurisdictions it has been held that the legislature could not even by joint resolution, recall and reconsider a [fol. 24] bill which has been sent to the Governor for approval and that even if the Governor should return the bill on request, the legislature has no power to reconsider it. See Wolfe v. McCaull, 76 Va. 876. In that case the court construed a constitutional provision to the effect that every bill passed by the Senate and House of Delegates and every

resolution requiring the assent of both houses of the Assembly shall, before becoming a law, be presented to the Governor and that if he shall approve it he shall sign it, but if not he shall return it, with his objections, to the House in which it originated which shall proceed to reconsider it, and that if the Governor shall not return it within five days after presentation to him it shall be a law.

The Court discussed the rules of the House of Representatives and the court held that where the Governor returned a bill without approval or veto for the purpose of reconsideration in obedience to a joint resolution recalling the bill before the expiration of the time allowed to the Governor for consideration the bill became a law after the expiration of such time without a veto. The Court said: "It is plain that the action of the Governor was a mere act of courtesy on the part of one coordinate branch of the Government toward another and was not intended and cannot be construed as a compliance with the requirements of the constitution, that if he did not approve it he should return it (the bill) with his objections to the House in which it shall have originated which shall enter the objections at large on their journal." And the Court further said "He (meaning the Governor) could not evade that duty, if he would, by allowing the legislature to recall the bill from his hands and to defeat by mere non-action a measure they have once declared with due solemnity to have passed."

To like effect is People v. Devlin, 33 N. Y. 269, 88 Am. Dec. 377.

In the instant case there was no joint action of the House and Senate asking a return of the bill from the Governor to either branch of the legislature and there was no action on the bill after its return to the House of Representatives by the Governor. It so happened that all these transactions transpired on the closing days of the legislative session and at the close of the session the Speaker of the House in due [fol. 25] course transmitted the bill to the Secretary of State showing its passage and authentication as hereinbefore stated.

We hold that neither the House of Representatives nor the Senate of the Legislature of Florida could by its independent resolution recall from the hands of the Governor a bill which had been duly passed by the legislature, had been authenticated and transmitted to the Governor for his con-

sideration, and that the action of the Governor in transmitting the bill to the House of Representatives in the instant case was a matter of courtesy and had no effect upon the validity of the act which had been duly and constitutionally passed and transmitted to him for his consideration.

The Second, Third, Fourth, Fifth, and Sixth grounds of the motion present the same question which we have just dealt with and it is neither necessary to quote the language used in such grounds nor to discuss either of them further, except to say that they are, under the state of the record, without merit.

The Seventh ground of the motion is as follows:

"That said alternative writ of mandamus shows upon its face that said purported Act is *Act is* unconstitutional for the reason that it is a levy by the State of an impost or duty upon a product imported into Florida from a foreign country, and the exclusive right to levy duty or impost is vested under the Constitution of the United States in the Congress."

This ground is untenable because the Act on its face shows that it does not purport to levy an impost or duty upon a product imported to Florida from a foreign country, but on the contrary it is shown that the fee required to be paid is an inspection fee to meet the expense incurred by the State in the enforcement of its inspection law. We may here revert to Article I, Section 10, paragraph 2, of the Constitution of the United States, which provides as follows:

"No State shall, without the consent of the Congress, lay any imposts or duties on Imports or Exports, except what may be absolutely necessary for executing its inspection [fol. 26] laws; and the net produce of all Duties and Imposts laid by any State on Imports or Exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the Revision and Control of the Congress."

It will be observed that this provision of the Constitution reserves in the States the right to lay imposts or duties on the imports or exports which may be absolutely necessary for executing its inspection laws. But in reserving that power in the States it was provided in this section of the Constitution that the net produce of all duties and imposts

laid by any State on imports or exports shall be for the use of the Treasury of the United States and all such laws shall be subject to the revision and control of Congress. Therefore, if the amount levied in this Act to cover the expense of inspection should exceed the costs of such inspection, the net surplus must be accounted for to the Treasury of the United States.

It will be observed that this power reserved in the States applies only to inspection fees laid on imports and exports. It is well settled that the provisions of paragraph 2, Section 10, Article 1, of the Constitution applies only to articles imported from or exported to foreign countries. See New Mexico ex rel. McLean v. Denver and R. G. R. Co., 203 U. S. 38, 27 Sup. Ct. 1, 51 L. Ed. 78; Patapsco Guano Co. v. N. C. Board of Agriculture, 18 Sup. Ct. 862, 171 U. S. 345, 43 L. Ed. 191; Woodruff v. Parham, 75 U. S. 123, 19 L. Ed. 382; Pittsburgh & S. Coal Co. v. La, 156 U. S. 590, 15 Sup. Ct. 459, 39 L. Ed. 544.

In Patapsco Guano Co. v. N. C. Board of Agriculture, supra, the Supreme Court of the United States, speaking through M. Justice Fuller, referring to this clause of the Federal Constitution, said:

"The second clause of #10 of Article 1 of the Constitution reads: 'No State shall, without the consent of the Congress lay any imposts or duties on imports or exports, ex- [fol. 27] cept what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.''

The words 'imports' and 'Exports' as therein used have been held to apply only to articles imported from or exported to foreign countries. Woodruff v. Parham, 8 Wall. 123 (19:382); Pittsburgh & S. Coal Company v. Louisiana, 156 U. S. 590, 600 (39: 544, 549). The clause recognized that the inspection of such articles may be required by the States, and that they may lay duties on them to pay the expense of such inspections, but as it would be difficult if not impossible to determine the necessary amount with exactness and to remove any inducement to excess, it was provided that any surplus should be paid to the United States. As such laws are subject to the revision and control of

Congress, it has been suggested that whether inspection charges are excessive or not might be for Congress to determine and not the Courts, which would also be so where inspection laws operate on interstate as well as foreign commerce. Neilson v. Garza, 2 Woods 287; Turner v. Maryland, 107 U. S. 38 (27, 370). Considered as an inspection law and as not open to attack as in contravention of that clause, the questions still remain whether an inspection law can operate on importations as well as exportations; and whether in this instance the charge was so excessive as to deprive the act of its character as an inspection law or as a legitimate exercise of protective governmental power, and make it a mere revenue law obnoxious to the objection of being an unlawful interference with interstate commerce. Counsel for plaintiff in error insists that this result is deducible from the legislation of North Carolina making appropriations from the funds of the department of agriculture received from the charge on fertilizers or fertilizing materials; as also from the evidence submitted on the hearing.
[fol. 28] It will be more convenient to first dispose of the latter contention."

Then after citing various statutes of the State of North Carolina, it is said:

"Inspection laws are not in themselves regulations of commerce, and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them, or determining their fitness, for domestic use and in so doing protecting the citizen from fraud. Necessarily, in the latter aspect, such laws are applicable to articles imported into, as well as to articles produced within, a state."

In the case of New Mexico ex rel. McLean v. Denver and R. G. R. Co., supra, Mr. Justice Day, speaking for the Court said:

"As to the objection predicated on #10 of article 1, that section can have no application to the present case, as that provision directly applies only to articles imported or exported to foreign countries. Patapso Guano Co. v. Board of Agriculture, 171 U. S. 345, 350, 43 L. Ed. 191-193, 18 Sup. Ct. Rep. 862, and cases cited. Moreover, that paragraph of

the Constitution expressly reserves the right of the states to pass inspection laws, and if this law is of that character it does not run counter to this requirement of the Constitution. The Question principally argued is as to the effect of this law upon interstate commerce, and it is urged that it is in violation of the Constitution because it undertakes to regulate interstate commerce, and lays upon it a tax not within the power of the local legislature to exact. It has been too frequently decided by this Court to require the restatement of the decisions, that the exclusive power to regulate interstate commerce is vested by the Constitution in Congress and that other laws which undertake to regulate [fol. 29] such commerce or impose burdens upon it are invalid. This doctrine has been reaffirmed and announced in cases decided as recently as the last term of this court. Houston & T. C. R. Co. v. Mays, 201 U. S. 321, 50 L. Ed. 772, 26 Sup. Ct. Rep. 491; McNeil v. Southern R. Co., 202 U. S. 543, 50 L. Ed. 1142, 26 Sup. Ct. Rep. 722. While this is true, it is equally well settled that a state or a territory for the same reasons in the exercise of the police power may make rules and regulations not confirming with the legislation of Congress upon the same subject and not amounting to regulations of interstate commerce. It will only be necessary to refer to a few of the many cases decided in this court holding valid enactments of legislatures having for their object the protection, welfare and safety of the people, although such laws may have an effect upon interstate commerce. Missouri K. & T. R. Co. v. Haber, 169 U. S. 613-635, 42 L. Ed. 878-885, 18 Sup. Ct. Rep. 488; Chicago M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. Rep. 289, Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132. The principle decided in these cases is that a state or territory has the right to legislate for the safety and welfare of its people, and that this right is not taken from it because of the exclusive right of Congress to regulate interstate commerce, except in cases where the attempted exercise of authority, by the legislature is in conflict with an act of Congress, or is an attempt to regulate interstate commerce. In Patapsco Guano Co. v. Board of Agriculture, supra, it was directly recognized the state might pass inspection laws for the protection of its people against fraudulent practices and for the suppression of frauds, although such legislation had an effect upon interstate commerce. The same principle was recognized in

Neilson v. Garza, 2 Woods, 287, Fed. Cas. No. 10,091, a case decided by Mr. Justice Bradley on the circuit and quoted from at length with approval by Mr. Chief Justice Fuller in the Patapsco case."

So it appears that there is a clear distinction to be drawn between the rights of states to legislate insofar as inspection is concerned in regard to merchandise imported or exported [fol. 30] to or from a foreign country and the right of a state to legislate insofar as inspection is concerned in regard to merchandise in interstate commerce between the states. When legislating as to inspection of merchandise imported into the state from foreign countries the Constitution by the clause hereinabove referred to has reserved in the State specifically the power to legislate concerning the inspection of such merchandise so imported, but by the specific provision of the Constitution has made such laws subject to the revision and control of the Congress. The purpose of this provision was that the states might reserve the right to protect the health, property and welfare of its citizens but with the power lodged in the Congress of the United States to revise or control such legislation so that it would not unlawfully interfere with commerce between the nations.

Now it is clear that if the fee here involved constituted a tax levied for revenue, it would violate the Federal Constitution as above referred to. See Mulger v. Kansas, 131 U. S. 661, 31 L. Ed. 210; Minnesota v. Barber, 10 Sup. Ct. Rep. 862, 136 U. S. 313, 34 L. ed. 455, Henderson v. New York, 92 U. S. 259, 23 L. Ed. 543; Voight v. Wright 11 Sup. Ct. Rep. 855; 141 U. S. 62, 35 L. Ed. 638; Brimmer v. Rebman, 11 Sup. Ct. 213, 138 U. S. 78, 34 L. ed. 862.

In many cases it has been held that the state in the exercise of the police power may make rules and regulations not conflicting with the legislation of Congress upon the same subject and not amounting to regulations of interstate commerce and enactments of legislatures have been held valid which have for their object the protection of the welfare and safety of the people; although such laws may have an effect upon interstate commerce. See Mo. K. & T. R. Co. v. Haber, 18 Sup. Ct. 488, 169 U. S. 613, 42 L. ed. 878, Chicago M. & St. P. R. Co. v. Solan, 18 Sup. Ct. 289, 169 U. S. 133, 42 L. ed. 688, Neilson v. Garza 2 Woods 287, Fed. Cas. No. 10,091.

In the light of the decisions, the provisions of the Constitution and the provisions of the Act under consideration,

we hold that it constitutes a valid inspection law; that the purpose of the act is for the safety and welfare of the consumer of commercial cement in the State of Florida.
[fol. 31] The Act sets up a standard which must be met and complied with in all cement sold in the State of Florida for the purpose mentioned in the Act. That standard is shown by the record to be the standard set up by the American Society of Testing Materials and approved by the United States Bureau of Public Roads for highway construction. It is made a criminal offense for any person, persons or association of persons, firm or corporation to sell, offer for sale or use in the State of Florida any cement in the construction of any hotel, apartment house, rooming house, dwelling or public building of any kind or character which does not measure up to the minimum standard fixed by the Act. The inspection of cement imported from foreign countries was deemed by the legislature to be necessary as a protection to dealers in Florida against having foisted on them a commodity which cannot be resold under the laws of Florida, and which, because of its inferior quality constitutes unfair competition in this commodity. In New Mexico ex rel. McLean v. Denver & R. G. R. Co., supra, in discussing the Act there under consideration it was said:

"It is argued that this act lays a special burden upon interstate commerce, because under the law, hides not offered for transportation are not required to be inspected after thirty days in slaughterhouses, and not at all outside of slaughterhouses. But legislation is not void because it meets the exigencies of a particular situation. Other statutory provisions apply to property remaining in the territory where possibly it may be found and identified. When shipped beyond the limits of the territory the means of reaching it are beyond local control, and it is the purpose of ## 3 to 4 of the Act of 1901 to preserve within the territory a record of the brands identifying the property and naming the purchaser or shipper. Certainly we cannot judicially say that there can be no valid reason for making the inspection in question apply only to hides offered for transportation beyond the territory, and that for that reason the tax [fol. 32] is an arbitrary discrimination against interstate traffic."

It is just as certain that we cannot judicially say that there can be no valid reason for making the inspection here

under consideration apply only to cement imported into the State of Florida from a foreign country and that for that reason the inspection and fee incident thereto is arbitrary discrimination against commerce between the nations.

The Eighth ground of demurrer is as follows:

"Eighth. Said purported Act sought to be enforced as law is unconstitutional for the further reason that it is discriminatory in that it imposes an impost or duty in the form of inspection fees upon imported cement from foreign countries and does not require the payment of any inspection fees on domestic cement."

What has been said above is sufficient to dispose of this ground.

The Ninth ground of the demurrer, that the Act violates Section 16 of Article 3 of the Constitution of Florida in that it contains more than one subject and matters properly connected therewith, is without merit.

The Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth grounds of demurrer are as follows:

"Tenth. Said bill arbitrarily interferes with the right to contract.

Eleventh. It affirmatively appears that the bill sets up no reasonable basis for fixing minimum standards for cement.

Twelfth. Said bill is discriminatory and violates Section I, Article XIV, Constitution of the United States in that it provides for inspection of foreign cement only.

Thirteenth. It manifestly appears that said bill tends to create a monopoly.

Fourteenth. It affirmatively appears that the allegations of the alternative writ fail to show a clear legal duty which the respondents may be compelled to perform.

Fifteenth. The alternative writ shows on its face that Relator is not entitled to the peremptory writ prayed for."

[fol. 33] We think that what we have heretofore said sufficiently states reasons for disposing of these latter grounds of demurrer adversely to the contentions of the Respondents.

While the question has not been presented by either of the respective parties, it has been suggested that the Respondents may not be heard to question the validity of the Act on authority of the opinion and judgment in the case of State ex rel. A. C. L. R. R. Co. v. Board of Equalizers of Florida, 84 Fla. 592, 94 Sou. 681.

In the case of State ex rel. A. C. L. R. R. Co. v. Board of Equalizers of Florida, supra the court refers to the case of Board of Public Instruction of Santa Rosa County v. Croom, et al., reported 57 Fla. 347, 48 Sou. 641, and says:

"The case of Board of Public Instruction for Santa Rosa County v. Croom, 57 Fla. 347, 48 South. Rep. 641, is not in conflict with the doctrine herein announced. In that case Mr. Knott's interest was directly affected. He was State Treasurer, and under a heavy bond. If he paid money out of the Treasury under the provisions of an unconstitutional Act, he or his bondsman would have had to bear the loss. His right to raise the question of the constitutionality of the Act involved did not grow out of the obligation of his oath of office, nor out of his official position, but because he was liable to be injured pecuniarily."

There is no material difference between the status of the State Road Department in the instant case and the status of Mr. Croom as Comptroller and Mr. Knott as State Treasurer in that case. If the State Road Department complied with the mandatory provision of the Act, the members of that department would be required to pledge or expend public funds in so doing and while if the Act should be enforced and should be held valid the fund pledged or expended would ultimately come from those paying the inspections fees, such fact does not place the State Road Department in such position that it is required to expend public money pursuant to provisions of a legislative Act which it in good faith believes to be invalid and unenforceable. The [fol. 34] Act here under consideration is of such a nature that its constitutionality may have well been, and in good faith, doubted. One who is required to pay out public funds should be at least reasonably certain that the same are paid out under valid law. See State of Fla. ex rel. Harrell et al. as Board of County Commissioners of Washington County, Fla. and C. W. Nelson vs. Fred P. Cone et al. as Board of Administration of State of Florida, J. M. Lee as Comptroller and Secretary of Board of Administration, W. V. Knott as

State Treasurer and County Treasurer ex officio of Washington County, filed at this Term of the Court. See also State ex rel. Neville, 123 Fla. 745-167 So. 650. Coppedge et al. vs. State, 99 Fla. 358, 127 So. 319.

The above enunciation is sound, although we recognize the rule to be that before any legislative Act can be judicially declared unconstitutional, its repugnance to the Constitution must be clearly shown and to the exclusion of all reasonable doubt.

It, therefore, follows that while the reasonable doubt of the constitutionality of a legislative Act may justify an officer charged with the duty of expending public funds only pursuant to valid law, in declining in the absence of a controlling court order, to pay out public funds under provisions of such a doubtful statute, such a reasonable doubt will not justify a court in striking down the Act as being unconstitutional.

For the reasons stated, the demurrer and motion to quash is denied and respondents are allowed ten days within which to file an answe. or return, in default of which peremptory writ will issue.

Ellis, C. J., and Terrell, J., concur.

Whitfield, P. J., and Brown and Chapman, J. J., Concur in the opinion and judgment.

[fol. 35] IN SUPREME COURT OF FLORIDA

PETITION FOR LEAVE TO APPEAR AS AMICUS CURIAE

To the Honorable Justices of the Supreme Court of the State of Florida:

Come now R. R. Saunders and Dwight L. Rogers, members of the Bar of this Court, on behalf of and in the instance and request of the Broward County Port Authority, a public corporation of the State of Florida, and respectfully prays the Court for permission to file a petition for a re-hearing in said cause to appear as amicus curiae in the above entitled cause, a petition for re-hearing having heretofore been filed by the Respondents herein by delivering the same to the Judges of this Honorable Court, and shows to the Court as follows, to wit:

1. That the Broward County Port Authority is a public corporation created by an Act of the Legislature of the State

of Florida, is pecuniarily and economically interested in the outcome of this legislation and the question raised by the pleadings in said cause.

That manifest and manifold discriminations will result to the Broward County Port Authority and to the merchants and taxpayers of the Broward County Port District by the imposition of the tax designated as an inspection fee and will also effect the contractors and the builders in said District by increasing the purchase price of cement by at least Three ($3.00) Dollars a ton and shall otherwise be a detriment to the citizens and businesses of said community and said Port District.

Your Petitioners will further show that heretofore the Court has rendered a decision in this cause but your Petitioners, as amicus curiae and as representing the interests of the Broward County Port Authority and the tax payers in said District respectfully show to the Court in the judgment rendered it overlooked or failed to consider pertinent and vital matters in harmony with the position taken by the Respondents in their brief and their argument before your Honorable Court.

2. In holding that said Act does not violate the Commerce Clause of the Federal Constitution (Article 1, Sec. 8), this Court overlooked and failed to consider that this Act does not require any inspection or levy any inspection fee upon any cement manufactured and sold and used in the State of [fol. 36] Florida, or *or* imported into Florida from any other State of the United States. But said Act only provides for the inspection and payment of fees with respect to cement imported into the State of Florida from a foreign country. And this Court also overlooked and failed to consider that the Supreme Court of the United States has held in Voight vs. Wright, 141 U. S. 68, 35 L. Ed. 683, and other cases, that a State may not under the guise of exercising its police powers or of enacting inspection laws, discriminate against the products and industries of some of the States in favor of the products and industries of its own and other States, and that a Statute that prevents products of distant States from coming into competition upon terms of equality with products of a domestic State, is repugnant to the Constitution of the United States. That any local regulation which in terms or by its necessary operation denies this equality in the markets of a State is,

when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and therefore void.

This Court further overlooked and failed to consider that the Federal Constitution grants the Congress of the United States the power to regulate commerce with foreign nations in precisely the same language as it does commerce among the States. That if a State Statute injuriously discriminating against the products of another State of the Union is forbidden by the Constitution, then a similar State Statute discriminating against goods imported from a foreign Country is equally forbidden. Cook vs. Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015.

3. This Court further overlooked or failed to consider that this Act before the Court nowhere provides for any inspection of cement manufactured, in Florida or anywhere else in the United States. The portion of said Act providing for a minimum standard for all cement offered for sale or sold or used in Florida, and its provision that it shall be unlawful to sell or offer for sale or use in Florida any cement which does not measure up to said minimum standard, makes no provision whatever for inspection of such cement. Furthermore, it provides for no levy of any [fol. 37] inspection fee whatever upon such cement. This Court further overlooked and failed to consider that the foregoing minimum standard provisions of said Act, as far as they go apply with equal force and effect to cement imported into Florida from a foreign country, but the further provisions in said Act for the inspection and license fees affecting cement imported from a foreign country into Florida, do not apply with equal force and effect, or apply at all, to cement manufactured in Florida or imported into Florida from any other State in the United States.

Therefore, the Court has overlooked and failed to realize that said Act lays a burden on cement imported into the State from a foreign country that is not laid upon cement manufactured in Florida or imported from any State of the Union, and that such a discriminatory burden violates said section of the Federal Constitution.

4. This Court in citing in its opinion Voight vs. Wright, 141 U. S. 68, 35 L. Ed. 638, and Brimmer vs. Rebman, 138

U. S. 78, 34 L. Ed. 862, misunderstood and overlooked the sole ground upon which said cases were decided by the United States Supreme Court. This Court cited said cases in support of the proposition that State may not levy an inspection fee as a revenue measure.

This Court therefore overlooked ' .e Statute involved in Voight vs. Wright laid no inspe..on fee for revenue. But on the contrary, the fee was laid entirely for inspection purposes. The sole issue raised and decided by the United States Supreme Court in that case was that since the Statute required the inspection only of flour imported into the State of Virginia, and did not require similar inspection of flour manufactured domestically, it constituted a burden on commerce, contrary to the Federal Constitution.

Furthermore, Brimmer vs. Rebman also cited in this Court's opinion, established and applied the same, identical principle. And this Court overlooked and failed to consider, for aught its opinion shows, the application of said principle and rule to the case at bar.

[fol. 38] Your Petitioners respectfully say that the Court overlooked the fact that this inspection fee is tantamount to a tax or duty laid upon a commodity in order to throttle competition with a domestic corporation and as illustrative of this fact Petitioners show that recently a shipment of cement was unloaded at Port Everglades in the Broward County Port District, consisting of Sixty thousand (60,000) sacks containing One hundred (100) pounds each and that this inspection fee of Three ($3.00) Dollars per ton would aggregate the sum of ($9,000.00) Nine Thousand Dollars, when as a matter of fact the actual cost of inspection under the largest cost possible for a thorough inspection did not exceed Two hundred Twenty-five ($225.00) Dollars (The cost being approximately one fortieth (1/40) of what the tax required under this Act).

Therefore, Petitioners pray that this Petition be filed and pray the Court for ten (10) days time in which to file the brief in said cause for the information and convenience of the Court.

Respectfully submitted, (Signed) Dwight L. Rogers,
R. R. Saunders, as Amicus Curiae.

In Supreme Court of Florida

Petition for Leave to Appear as Amicus Curiae, etc.

To the Honorable Justices of the Supreme Court of the State of Florida:

Comes now Philip D. Beall, a member of the Bar of this Court on behalf and at the instance of the Chamber of Commerce of Pensacola, Florida, a corporation, and respectfully prays the Court permission to appear as amicus curiae in the above entitled cause, in which petition for rehearing has been filed, and shows unto the Court:

1

That manifest and manifold discriminations will result to the Port of Pensacola and the merchants of this City dealing in cement by the imposition of the tax designated "inspection fee" in the Act in question, interfering thereby in the usual and ordinary commerce of the City and Port of Pensacola, to the detriment of the citizens and businesses of said community, in that:

[fol. 39] (a) Large quantities of said commodity are purchased and brought into said City, and thereafter sold and distributed in interstate commerce to persons in adjoining states, in competition with dealers in such states, which dealers importing cement through ports of other states, do so without the handicap of an inspection fee.

(b) That due to the close proximity of this community to ports of other states, such commodities might be imported through other ports in other states and shipped into this State, without the payment of the tax under the guise of an inspection fee set forth in the Act.

(c) That such tax under the guise of an inspection fee in fact renders prohibitive competition with merchants not required to pay such tax.

(d) That said Act is unfair, unjust and unreasonable to the industry, in that no inspection is provided for cement other than that specifically described in the Act as imported cement, showing thereby on the face of the Act that same is not in fact a "pure cement" law. Whereby this com-

munity is deeply interested and seriously affected by such Act.

Petitioner having hereinabove shown the interest of the Chamber of Commerce and the community in the cause, respectfully shows unto the Court that:

(a) Said Act is not such an Act as that considered by the Court in Patapasco Guano Company vs. Board of Agriculture, 181 U. S. 346-361 43 L. Ed. 191 (North Carolina-fertilizer case). Such case plainly provided for the inspection of all fertilizers and a uniform fee for the inspection of all kinds, whether imported or domestic, or from other States, but is a statute similar to that construed in Voight vs. Wright, 141 U. S. 62, 35 L. Ed. 638 (the Virginia flour inspection Act), which was held unconstitutional because it required the inspection of flour from other states when no such inspection was required of flour manufactured in Virginia. The Court stating in the fertilizer case that such fertilizer statute is not open to such objection "for the inspection and payment of its costs are required in respect of all fertilizers, whether manufactured in the State or out of it.

[fol. 40] Wherefore, the Court overlooked or failed to consider the legal effect of such opinions, and that:

(a) The Florida Cement Act does not require an inspection of or levy an inspection fee upon any cement manufactured and sold and used in the State of Florida, or imported into Florida from any other State of the United States. But only provides for an inspection and payment of fees with respect to cement imported into the State of Florida from a foreign country.

(b) That such Act, therefore, is identical in its imperfections with that of the Virginia flour statute held invalid in the Voight case above, and the previous Supreme Court case of Brimmer vs. Rebman, 138 U. S. 78, 34 L. Ed. 862. (The Virginia meat inspection Act).

Respectfully, Philip D. Beall, Amicus Curiae.

IN SUPREME COURT OF FLORIDA, JUNE TERM, A. D. 1937

ORIGINAL JURISDICTION MANDAMUS

STATE OF FLORIDA ex Rel. Florida Portland Cement Company, a Corporation, Relator,

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, Brooks W. Bateman and James W. Perkins, as and Constituting the State Road Department of the State of Florida, Respondents

CLERK'S CERTIFICATE

I, G. T. Whitfield, Clerk of the Supreme Court of Florida, do hereby certify that on the 29th day of July, 1937, petition for mandamus was duly filed in said Supreme Court by State of Florida ex rel. Florida Portland Cement Company, a corporation, Relator, against A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of the State of Florida, Respondents; that thereafter based upon said petition the Supreme Court of Florida did on the 29th day of July 1937, issue and grant its Alternative Writ of Mandamus directed to said respondents, a copy of said Alternative Writ of Mandamus as issued by said Supreme Court being hereto attached marked Exhibit "A", and thereafter the Respondents in compliance with and obedience to said Alternative Writ of Mandamus filed their Demurrer or Motion to Quash said Alternative Writ of Mandamus copy of the Demurrer or Motion to Quash as filed by the Respondents in said Supreme Court is hereto attached marked Exhibit "B".

[fol. 41] I Further Certify that thereafter Briefs were duly filed on behalf of the Relator as well as Respondents and said cause was duly orally argued before the Supreme Court of Florida and the Supreme Court of Florida did on the 12th day of October 1937, hand down its decision, judgment and Opinion overruling and denying said demurrer or motion to quash filed by the Respondents, copy of said decision, judgment and opinion in said Supreme Court of Florida being hereto attached marked Exhibit "C"; that thereafter the Attorney representing the Respondent in said

cause filed a petition for rehearing and subsequently Respondents filed praecipe for withdrawal of said petition for rehearing which petition and said praecipe are pending before the Supreme Court of Florida undisposed of; that on November 1, 1937, R. R. Saunders and Dwight L. Rogers, members of the Bar of this Court, on behalf of and in the instance and request of the Broward County Port Authority, a public corporation of the State of Florida, and Philip D. Beall, a member of the Bar of this Court, on behalf and at the instance of the Chamber of Commerce of Pensacola, Florida, a corporation, filed petitions to intervene in said proceeding and also filed petitions for rehearing in said cause all of which said petitions are pending before the Supreme Court of Florida at the present time undisposed of.

And I Further Certify that the papers hereto attached are true and correct copies of the originals as the same are on file in my said office as Clerk of the Supreme Court of the State of Florida.

Witness my hand and the seal of the Supreme Court at Tallahassee, Florida, this 8th day of November, A. D. 1937.

G. T. Whitfield, Clerk of the Supreme Court of Florida. (Seal.)

[fol. 42] In Supreme Court of Florida, June Term, A. D. 1937

State of Florida,
County of Leon, ss:

I, William H. Ellis, Chief Justice of the Supreme Court of Florida do hereby certify that G. T. Whitfield, is Clerk of said Supreme Court of the State of Florida and that he is the custodian of and has in his possession all papers, documents and records filed in all cases and proceedings pending before said Court.

In Testimony Whereof, I have hereunto subscribed my name and caused to be affixed the seal of said Supreme Court at the City of Tallahassee, in said county and state, this 8th day of November, A. D. 1937.

W. H. Ellis, Chief Justice of the Supreme Court of the State of Florida. (Seal.)

[fol. 43] IN UNITED STATES DISTRICT COURT

ORDER DENYING TEMPORARY RESTRAINING ORDER—NOV. 9, 1937

This cause coming on this day to be heard on the application of the plaintiff for entry of temporary restraining order to restrain the inspection provisions of the Act of the Legislature of the State of Florida, known as Senate Bill 760 of the year 1937, and it appearing that due notice thereof has been given and that all parties are present by counsel, now therefore, upon consideration thereof, it is:

Ordered, Adjudged and Decreed that upon the affidavit of the Chairman of the State Road Department and the statement of counsel that no effort will be made to enforce the inspection provisions of said Senate Bill No. 760 until after November 26, A. D. 1937, the application for said temporary restraining order is hereby denied.

Done and Ordered at Pensacola, Florida, this 9th day of November A. D. 1937.

A. V. Long, District Judge.

IN UNITED STATES DISTRICT COURT

ORDER CONVOKING A STATUTORY THREE-JUDGE COURT—November 9, 1937

The above entitled cause coming on to be heard upon application made to the Judge of the Northern District of Florida, for a temporary restraining order, which said temporary restraining order was denied upon the affidavit of the Chairman of the State Road Department and the statement of counsel that no effort will be made to enforce the inspection provisions of Senate Bill No. 760 until after November 26, A. D. 1937; and it appearing that the Bill of Complaint is brought to enjoin A. B. Hale as Chairman, and certain other defendants as and constituting the State [fol. 44] Road Department of the State of Florida and to authorize and empower the State Road Department of the State of Florida, from the enforcement of said Senate Bill No. 760, which was passed at the session of the Legislature for 1937, being that certain statute of the State of Florida being entitled "An Act providing for the fixing of a mini-

mum standard for all cement offered for sale, sold or used in the State of Florida and to authorize and empower the State Road Department of the State of Florida to write rules and regulations for the effectual enforcement of this act; providing for the inspection of all cement imported and brought into the State of Florida from any foreign country and providing for an inspection fee to be paid for the inspection of all cement imported and brought into the State of Florida from any foreign country and offered for sale, sold, or to be used in the State of Florida; providing penalties for the violation of any of the provisions of this act as well as any rule or regulation promulgated by the State Road Department; and providing for the enforcement of the provisions of and regulations made in pursuance of this Act."—this being a case in which it is sought to enjoin the officials of the State Road Department from the enforcement of the inspections provisions of said act, the contention of plaintiff being that the Act (Senate Bill No. 760) violates the provisions of the Fourteenth Amendment of the Constitution of the United States, and impinges on the rights of plaintiff created thereby; and that it violates Section 8 of Article 1 of the Constitution of the United States in that it levies a tax on commerce between the United States and foreign countries and constitutes as such, a direct burden on such commerce, and that it likewise prohibits the importation in the State of Florida of a legitimate article of commerce; and that it also violates Section 10 of Article 1 of the Constitution of the United States in that it levies an impost or duty under the misnomer of an inspection law.

[fol. 45] Now, therefore, pursuant to Section 380, Title 28, U. S. C. A. I hereby call to my assistance for the hearing and determination of the application for temporary injunction applied for in said cause the Honorable Rufus E. Foster, United States Circuit Judge in and for the Fifth Circuit, and the Honorable Alexander Akerman, United States District Judge for the Southern District of Florida, the hearing of said cause to be held on Friday, the 26th day of November, A. D. 1937, at 10 o'clock A. M., in the United States Court Room in the City of New Orleans.

Martin H. Long, Esquire, Counsel for Complainant, will give notice at least five days before the date of said hearing to the defendant in said cause, and to Messrs. Whitaker and Whitaker, Tampa, Florida, of counsel for the Florida

Portland Cement Company, as well as to the Governor of the State of Florida and to the Attorney General of said State.

Done and Ordered in Chambers in Pensacola, Florida, this 9th day of November A. D. 1937.

A. V. Long, United States District Judge.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL OF COMPLAINT—Filed November 24, 1937

The named defendants in this cause respectfully move the Court to dismiss the bill of complaint filed herein upon the following grounds:

1. There is no equity in the bill of complaint.

2. The bill of complaint fails to allege jurisdictional facts in that it does not allege that the matter in controversy exceeds exclusive of interest and cost the amount or value of Three Thousand Dollars.

3. The bill of complaint in attempting to allege excessiveness in the amount of the fees fixed by the Statute under attack alleges mere conclusions of the pleader and does not allege that the amount of fees levied for inspection purposes is not and will not be absolutely necessary to defray the expenses of inspection under the act.

[fol. 46] 4. This Court is without jurisdiction to grant the relief sought because of the prohibition contained in Section 265 of the Judicial Code, U. S. C. A., Title 28, Section 379, since the granting of an injunction as prayed would have the effect of staying the proceeding now pending in the Supreme Court of Florida against these defendants involving the validity of the Florida statute here under attack.

5. It appears from the allegations of the bill that the State of Florida, acting through its Legislature, had the power under Article 1, Section 10, clause 2 of the Federal Constitution to enact the statute here under attack and it does not appear that the amount of fees therein fixed will not be absolutely necessary for the purposes for which said fees are required.

6. By the provisions of Article I, Section 10, clause 2 of the Congress of the United States and not the Federal Courts has the power to revise and control the act here under attack.

Respectfully submitted, Cary H. Landis, Attorney General of Florida; H. E. Carter, Assistant Attorney General; Richard P. Daniel, R. W. Erwin, Solicitors for Defendants. Pat Whitaker, of Counsel.

IN UNITED STATES DISTRICT COURT

NOTICE OF HEARING—Filed November 27, 1937

To Hon. Fred P. Cone, as Governor of the State of Florida; Hon. Cary D. Landis, as Attorney General of the State of Florida; Messrs. Whitaker & Whitaker, Tampa, Florida, of Counsel for Florida Portland Cement Company, and the Defendants Above Named:

Please Take Notice that Bimco Trading, Inc., Plaintiff in the above entitled cause will on Friday, the 26th day of November A. D. 1937, at ten o'clock A. M. or as soon there- [fol. 47] after as counsel can be heard apply to the Honorable Rufus E. Foster, United States Circuit Judge, in and for the Fifth Circuit and the Honorable Alexander Akerman, United States District Judge for the Southern District of Florida, Hon. A. V. Long, United States District Judge for the Northern District of Florida, in the United States Court room in the City of New Orleans, State of Louisiana, for a temporary injunction to restrain the defendants from enforcing the inspection provisions of the Act of Legislature of the State of Florida of 1937, known as Senate Bill No. 760.

Martin H. Long, Solicitor for Plaintiff.

STATE OF FLORIDA,
County of Duval:

Martin H. Long, being first duly sworn deposes and says that on Friday, November 12th, A. D. 1937, at or about one o'clock p. m. he mailed a copy of the above notice to the persons named therein by depositing in the United States

mails at Jacksonville, Florida, copies of said notice addressed as follows:—

Hon. Fred P. Cone, Governor of Florida, Tallahassee, Florida.

Hon. Cary D. Landis, Attorney General of Florida, Tallahassee, Florida.

Messrs. Whitaker & Whitaker, Attorneys at Law, Tampa, Fla.

Hon. A. B. Hale, as Chairman of the State Road Department, Tallahassee, Fla.

That each of said envelopes was securely sealed and had thereon the necessary postage for transmission through the mails.

Martin H. Long.

Sworn to and subscribed before me this 12th day of November, 1937. Judson Freeman, Notary Public State of Florida at Large. My commission expires Jan. 12, 1941. (Official Seal.)

[fol. 48] IN UNITED STATES DISTRICT COURT

STATEMENT OF ALLEN J. WEAVER—Filed November 27, 1937

STATE OF FLORIDA,
County of Duval:

Allen J. Weaver, being first duly sworn, deposes and says that he is the owner of the Southern Analytical Laboratory, of Jacksonville, Florida, and as such duly authorized to make this affidavit; that the said Southern Analytical Laboratory is duly qualified and equipped to make engineering tests and chemical analysis, and has been engaged in the making of said tests and analysis for a period of ten (10) years; that the said Southern Analytical Laboratory has made numerous mill tests of cement, and the customary charge made for such tests has been about two cents (2¢) per barrel, a barrel being equivalent to four (4) bags and containing three hundred seventy-six (376) pounds of cement; that the said Laboratory has also made several tests of cement imported into the State of Florida by Bimco

Trading, Inc., and the customary charge made the said Bimco Trading, Inc. for such tests has been Ten Dollars ($10.00) per test.

Allen J. Weaver.

Sworn to and subscribed before me this — day of November A. D. 1937. —— ——, Notary Public, State of Florida.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CARL W. J. GRIMMELMAN—Filed November 27, 1937

STATE OF NEW YORK,
County of New York:

Carl W. J. Grimmelman, being first duly sworn, deposes and says he is General Manager of the Plaintiff herein, and as such is duly authorized to make this affidavit; that the plaintiff, Bimco Trading, Inc., now has some 52,000 bags of [fol. 49] cement, each containing ninety-four pounds net, loaded aboard the Steamship "Lisbeth", which is now at sea, and which is due to dock at Miami on Friday, the 26th day of November, A. D. 1937, and there discharge 40,200 bags of this cargo, and after discharging there, proceed to the port of Palm Beach, Florida, and discharge some 11,800 bags, the balance of the cargo; that all of the cement above mentioned was manufactured in a foreign country, and therefore subject to inspection under the provisions of Florida Senate Bill No. 760, and that plaintiff will be required under the provisions of said Senate Bill No. 760 to pay the sum of fifteen cents (15¢) per one hundred pounds, or a total of some Seven Thousand Three Hundred Dollars ($7,300.00) as a fee for this inspection; that prior to the enactment of the said Senate Bill No. 760, plaintiff would have been required to pay only the sum of Fifteen Dollars ($15.00) for inspection and test by a qualified and recognized inspecting laboratory of this entire cargo of cement and commercially accepted by architects, engineers, builders and contractors; that plaintiff cannot pass on to the buyers and consumers of this cement the approximately fifteen

cents (15¢) per bag it will be required to pay under the provisions of the said Senate Bill No. 760.

Carl W. J. Grimmelman.

Sworn to and subscribed before me this 24 day of November, A. D. 1937. Joseph Groeger, Notary Public, State and County Aforesaid. Notary Public Kings Co. No. 439. Reg. No. 9034, Cert. filed in N. Y. Co. No. 531. Reg. No. G331. Commission expires March 30, 1939. (Official Seal.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF F. E. MILLER—Filed November 27, 1937

Bimco Trading, Inc., 225 Broadway, New York City, New York.

Attention Mr. Carl W. J. Grimmelman

DEAR SIR:

For your information we submit the following outline of testing services that we have rendered on cement imported by you into ports on the lower east Coast of Florida.

Several years ago when you first began importing cement into the Port of Miami, the first three or four cargoes were sampled and tested in accordance with A. S. T. M. standard [fol. 50] specifications for sampling and testing Portland Cement. For this service we were paid at the unit rate of one and one-half (1½¢) cents per barrel.

On later cargoes we took a composite sample of the entire cargo and made a physical and chemical test on this sample for which we were paid at the rate of twelve dollars and fifty cents ($12.50) per sample. Some cargoes were not sampled or tested at all.

In the services rendered on your behalf the sampling and testing has been done in accordance with the latest standard of the American Society of Testing Materials.

Very truly yours, The H. C. Nutting Company, by F. E. Miller, Branch Manager.

FEM:CSH.

Sworn and subscribed before me this 23rd day of November, 1937. Carolyn Hyatt, Notary Public State of Florida at large. My Commission expires Aug. 19, 1940. (Official Seal.)

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF N. W. GRAVES—Filed November 27, 1937

To Whom it May Concern:

This is to certify that we have been handling and selling continuously since February, 1935, Aaolborg Cement, imported by the Bimco Trading Company, 225 Broadway, New York, N. Y., in the territory known as the greater Miami area. We have found it equal in quality to any other cement shipped into this area. We have supplied a great many of the larger structures that have been erected during this period of time and in each and every case the results obtained have been highly satisfactory.

Norman Graves Company, by N. W. Graves, Pres.

Sworn and subscribed before me this 23rd day of November, 1937. S. M. Sweeting, Notary Public State of Florida at Large. My Commission expires Feb. 21, 1941. (Official Seal.)

[fol. 51] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF P. H. BATES, CHIEF OF THE DIVISION OF CLAY AND SILICATE PRODUCTS, NATIONAL BUREAU OF STANDARDS, UNITED STATES DEPARTMENT OF COMMERCE—Filed November 27, 1937

P. H. Bates, being first duly sworn, deposes and says as follows:

1. I am the Chief of the Division of Clay and Silicate Products, National Bureau of Standards, United States Department of Commerce; Chairman of the Committee on Cement, Lime and Plaster of the Federal Specifications Executive Committee, which is the official body of the Fed-

eral Government charged with the establishment of standards for procurement by all Executive Departments and Establishments of the Federal Government; Chairman of the Committee on Cement, and member of the Executive Committee of the American Society for Testing Materials; and I am familiar with the standard specifications for cement used for construction purposes.

2. I have carefully examined the statute of the State of Florida, filed in the office of the Secretary of State of Florida on June 5, 1937, being Senate Bill No. 760.

3. I am familiar with the standard specifications for cements established by the Federal Specifications Executive Committee for cement used by the Executive Departments and establishments of the Government of the United States in most of their many construction activities and with the special specifications used for the purchase of cement in such special projects as Boulder Dam, Bonneville Dam and Grand Coulee Dam. I am also familiar with the inspection and testing which is made to determine whether the cement so used conforms to these standards. The inspection and testing is made under my direction and supervision. I am consequently also familiar with the cost to the Federal agencies concerned of such inspection procedure.

4. I am also familiar with the standard specifications for cement established by the American Society for Testing Materials which are prescribed in the Florida statute referred to in paragraph 2 of this affidavit as the standard to which all cement offered for sale or sold or used in the State of Florida must conform.

[fol. 52] 5. In my opinion the standards established by the Federal Specifications Executive Committee are more rigorous than those established by the American Society for Testing Materials, and consequently I believe that the costs of inspection and testing pursuant to the former standards should not be less than those carried out pursuant to the latter standards.

6. According to the official records of the National Bureau of Standards kept under my supervision and upon the basis of my personal experience in supervising the inspection and testing of cement referred to above which is purchased for

the use of the United States government, the inspection and testing of such cement pursuant to the standards established by the Federal Specifications Executive Committee cost the United States a maximum of 5¢ per standard unit (barrel of 376 pounds) when inspection and testing are made of small lots of cement of 400 barrels or less. When inspection and testing are made of larger lots, the costs are reduced, reaching a minimum of 1½¢ per barrel. The costs referred to in this and the succeeding paragraph include salaries of inspection officials and laboratory technicians, administrative and supervisory salaries and expenses, cost of materials, allowance for cost of equipment and replacement and repair thereof, clerical charges, and transportation of individuals, samples and equipment.

7. In my opinion a reasonable cost, computed on a liberal basis, for thorough and adequate inspection and testing of cement, pursuant to the standards established by the American Society for Testing Materials, should not exceed a maximum of 5¢ per barrel for lots of cement aggregating 300 barrels or less. For lots in excess of this amount, the reasonable cost for such inspection should, in my opinion, be suitably reduced.

P. H. Bates.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 24th day of November, 1937. Wm. C. Fewell, Notary Public. My Commission expires February 23, 1938. (Official Seal.)

[fol. 53] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF THE HONORABLE CORDELL HULL, SECRETARY OF STATE OF THE UNITED STATES—Filed November 27, 1937

Cordell Hull being duly sworn deposes and says:

1. I am the Secretary of State of the United States and as such it is my official duty to conduct, under the President of the United States, the foreign relations of the United States, including relations in connection with matters of foreign commerce and including specifically negotiations undertaken pursuant to the so-called Trade Agreement Act, being an amendment to the Tariff Act of 1930 (U. S. Code Tit. 19, Sec. 1351; 48 Stat. 943).

2. The statute of the State of Florida which is attacked in this suit has been officially called to my attention by a protest made on behalf of the Belgian Government and by other communications. The issues here involved relate to questions of the utmost public importance and I am informed the final determination of those issues may have a substantial effect upon the treaty making power of the Federal Government and upon the conduct of its foreign commercial relations.

3. For the above reasons I desire to set forth for the benefit of the Court certain facts of which I am cognizant and which are pertinent to the issues before this Court.

4. I am advised that the great bulk of domestic Portland cement consists of the standard or ordinary grade manufactured to conform to certain standard specifications generally adopted in this country, that the major portion of the imported cement likewise consists of the standard or ordinary grade produced to conform with domestic standards, and that there is accordingly very little difference in quality between this cement and the standard American grade. As is shown by Table I, which is attached hereto, United States manufacturers of Portland cement supply the great bulk of domestic requirements.

[fol. 54] 5. For many years comparatively small quantities of cement have been imported into the United States. Imported cement is used almost exclusively in certain coastal districts which can be economically served by the imported as well as the domestic product, due to advantageous transportation factors. Because of the weight of cement and the consequent high cost of transporting it overland, little imported cement is shipped beyond trucking distance of the port of importation. However, at the coastal points at which it can be imported, imported cement may play an important part in local construction. Imports into the United States of Portland and other hydraulic cement for a number of recent years are shown in Table I, together with the ratio of imports to domestic production.

6. For seventeen years prior to the passage of the Tariff Act of 1930, cement was on the free list although under the Tariff Act of 1922, a so-called "countervailing" or contingent duty was levied on cement. The statute provided that

the rate of the "countervailing" duty was to equal to the rate of the duty imposed on American cement by the exporting country. The Tariff Act of 1930 (U. S. Code, Tit. 19 Sec. 1001, Paragraph 205 (b) imposed a duty of six cents per hundred pounds on "Roman, Portland, and other hydraulic cement or cement clinker, * * * including the weight of the container." As a result of the imposition of a tariff on cement and of the decline in construction activities in the United States, accompanying the general business recession which occurred in the early part of the present decade, imports of cement were sharply curtailed in 1930 and the years immediately following.

7. On February 27, 1935, the United States entered into a trade agreement with the Belgo-Luxemburg Economic Union in which the United States granted a reduction of one and one-half cents per one hundred pounds in the customs duty applicable to Roman, Portland and other hydraulic cement or cement clinker of Belgian or Luxemburg origin. (Reciprocal Trade Agreement between the United States of America and the Belgo-Luxemburg Union, 49 Stat. 3680, 3681, 3691.) In return for this and other concessions and assurances granted by the United States, the Belgo-Luxem- [fol. 55] burg Economic Union granted important customs advantages to industrial and agricultural products of the United States.

8. The trade agreement with the Belgo-Luxemburg Economic Union was concluded under the authority of the so-called Trade Agreements Act, which amended the Tariff Act of 1930, by adding at the end of Title III thereof, Section 350 (U. S. Code, Tit. 19 Sec. 1351; 48 Stat. 943). This section authorized the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or of any foreign Country are unduly burdening the foreign trade of the United States, to enter into trade agreements with foreign governments or instrumentalities thereof and to proclaim "such modifications of existing duties and other import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any articles covered by foreign trade agreements as are required or appropriate to carry out any foreign trade agreements that the President has entered into" under the authority conferred on him in the section.

9. The authority of the President to proclaim modifications of existing duties and other import restrictions is subjected to certain restrictions and limitations set forth in the same section, the most important of which is that he may not alter any existing rate of duty by more than 50 per centum.

10. The objectives and policy of the Congress in enacting the "Trade Agreement Act," as expressed in that Act, were stated to be:

For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public, and in establishing and maintaining a better relationship among various branches of American agriculture, industry mining and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign [fol. 56] markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States. * * *

11. The following comment was made upon the concession on cement granted to the Belgo-Luxemburg Economic Union in the official analysis of the trade agreement issued by the United States Department of Commerce:

A number of products affected by the concessions granted to Belgium are used by the building trades by other industries, and by agriculture. The prices of some of these products, especially in the building trades, have been maintained in recent years at levels considerably above prices in general and also above prices of other building materials. This price rigidity has reacted unfavorably upon the agricultural, building, and other industries utilizing these products. The reductions in duty provided in the Belgian agreement should introduce more flexibility in prices to the advantage of all these industries and to the building industry in particular. Among articles of this type are the following: * * * cement. * * * (Department of Commerce release of March 1, 1935, "An Analysis of the Trade Agreement between the United States and Belgium".)

12. Under the terms of Section 350 of the Tariff Act, the rates of duty and other import restrictions proclaimed in connection with trade agreements are extended to articles the growth, produce or manufacture of all countries, but the President is given authority to suspend the application thereof to articles the growth, produce or manufacture of any country which discriminates against the commerce of the United States. The provisions of the trade agreement with the Belgo-Luxemburg Economic Union, including the rate of duty on cement, were proclaimed by the President on April 1, 1936, (49 Stat. 3680, 3691). The rate on hydraulic cement of four and one-half cents per hundred pounds granted to the Belgo-Luxemburg Economic Union is, therefore, the effective rate of duty applicable to cement from all non-discriminating countries. At the present time, the rates of duty proclaimed in connection with trade agreements are extended to the products of all countries except Germany and Australia.

13. The State of Florida is an important market for imported cement. Imports entered in the Florida customs district, which comprise the entire State of Florida, during [fol. 57] several recent years are shown in Table II, attached hereto. During the year 1936, the only full calendar year during which the trade agreement with the Belgo-Luxemburg Economic Union has been in effect, 132,076,039 pounds of hydraulic cement or 21 per cent of total imports into the United States, were entered in the Florida district. Imports of such cement into Florida during that year were valued at $310,634. Approximately 70 per cent of the cement imported into Florida is supplied by Belgium.

14. The inspection fee provided for in the act of June 5, 1937, of the Legislature of the State of Florida amounts to 15 cents per one hundred pounds, of three and one-third times the customs duty levied by the Federal Government on hydraulic cement imported from Belgium and other non-discriminating countries. On the basis of a landed duty paid price of $1.60 per barrel of 376 pounds, at which I understand that imported cement is quoted at Florida ports, the fee is equivalent to an additional duty of approximately 35 per cent ad valorem. It seems probably that this large fee which is levied only on cement imported from foreign countries and not on cement produced in Florida and other states of the Union, will effectively prevent the importation

of foreign cement into Florida and consequently will impose a serious discriminatory burden upon the foreign commerce of the United States.

15. Furthermore, in view of the importance of Florida as a market for imported cement, the inspection fee levied by the State of Florida on cement of foreign manufacture is likely to nullify largely the concession granted in the trade agreement with the Belgo-Luxemburg Economic Union. The Belgian Government has protested to the Department of State against the Florida inspection fee, which it states is contrary to the spirit of the trade agreement and cannot fail to be a heavy burden on trade between Belgium and the United States.

Cordell Hull, Secretary of State of the United States.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 24th day of November, 1937. Percy F. Allen, Notary Public. (Official Seal.)

[fol. 58]

Table I

Portland and Other Hydraulic Cement: Imports* Into the United States From Principal Sources, 1929–1937

	1929	1930	1931	1932	1933	1934	1935	1936	Jan.-Aug. 1937
Quantity (1,000 lbs.):									
Belgium	445,998	172,320	37,299	27,643	58,262	39,979	89,622	318,161	235,732
Denmark	120,199	102,234	69,547	46,817	83,123	34,665	80,204	123,688	73,042
Germany	6,838	4,224	1,872	599	5,711	946	28,029	96,650	50,885
Netherlands	.....	.....	.....	.....	221	.....	.....	16,584	39,472
Norway	1,015	9	.....	.....	1,130	3,048	7,567	11,657	12,006
United Kingdom	67,084	75,676	41,128	81,553	19,261	3,406	950	5,748	a
All other countries	5,734	12,342	22,075	17,287	9,971	16,409	25,629	49,605	44,744
Total	646,868	366,805	171,921	173,899	177,679	98,453	232,001	622,093	455,881
Value:									
Belgium	$1,176,619	$472,045	$114,256	$63,533	$111,707	$95,548	$228,925	$701,867	$414,139
Denmark	413,805	351,854	195,587	92,469	188,673	97,356	234,820	317,325	181,407
Germany	33,914	24,706	9,231	2,129	12,559	3,246	58,258	190,954	92,644
Netherlands	.....	.....	.....	.....	536	.....	.....	28,024	68,933
Norway	3,671	.....	.....	.....	2,540	6,287	14,434	21,740	23,722
United Kingdom	267,281	235,673	121,675	153,674	43,365	7,586	9,675	29,029	a
All other countries	34,853	51,535	67,169	39,228	29,080	43,752	61,964	119,606	110,378
Total	1,930,143	1,135,813	507,918	351,033	388,460	253,775	609,076	1,408,545	891,223

* Imports for consumption, 1929, and 1934–1937; General imports in other years.
a Included in "other countries."
Source: Foreign Commerce and Navigation of the United States, and records of the Department of Commerce.

[fol. 59] Table I

Portland Cement, Domestic Production, and Total Imports Into the United States

Year	Production	Imports for Consumption*		Ratio of Imports to Production
		Quantity	Value	
	1,000 pounds	1,000 pounds		Percent
1920	37,608,740	195,948	$1,230,914	0.52
1921	37,164,610	45,991	388,828	0.12
1922	43,161,034	121,754	628,846	0.28
1923	51,685,049	631,109	2,963,833	1.22
1924	56,158,649	756,112	3,116,564	1.35
1925	60,783,747	1,374,692	5,814,163	2.26
1926	61,863,343	1,215,418	5,128,061	1.96
1927	65,125,649	770,923	2,960,577	1.18
1928	66,288,366	859,694	3,099,160	1.30
1929	64,162,910	646,868	1,930,143	1.01
1930	60,610,158	366,805	1,135,813	.60
1931	47,161,331	171,921	507,918	.36
1932	28,854,595	173,899	351,133	.61
1933	23,865,919	177,453	387,991	.74
1934	29,233,160	98,453	253,775	.34
1935	28,854,830	232,001	609,076	.80
1936	42,260,896	622,093	1,408,545	1.47
Jan. to Aug., 1937	29,304,312	455,881	891,223	1.55

* Including a small amount of other hydraulic cement.

Sources: Bureau of Mines, Department of the Interior: Foreign Commerce and Navigation of the United States Records of the Department of Commerce.

[fol. 60] Table II

Portland and Other Hydraulic Cement: Imports for Consumption Into the Florida Customs District

	From all countries		From Belgium	
	Pounds	Value	Pounds	Value
1935	35,644,047	$111,070	21,844,023	$61,162
1936	132,076,039	310,634	94,376,898	219,545
Jan.–August 1937	81,507,458	170,921	57,218,058	108,233

Source: Records of the Bureau of Foreign and Domestic Commerce, Department of Commerce.

[fol. 61] In United States District Court

Order Granting Interlocutory Injunction—November 27, 1937

Before Foster, Circuit Judge, and Akerman and Long, District Judges

This case came on for hearing on application for an interlocutory injunction and was argued by counsel. The Court being of the opinion that the interlocutory injunction should issue as prayed for it is so ordered. The Court reserves the

right to file findings of fact and conclusions of law at a later date.

It is further ordered that plaintiff give bond in the sum of $1,000, conditioned according to law, to be approved by the Clerk of the District Court.

Rufus E. Foster, U. S. Circuit Judge. Alexander Akerman, U. S. District Judge. A. V. Long, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

PETITION OF BROWARD COUNTY PORT AUTHORITY FOR LEAVE TO INTERVENE—Filed December 1, 1937

To the Honorable District Judge of the Above Styled Court:

The Broward County Port Authority, your petitioner herein, respectfully alleges and shows as follows:

1. That your petitioner, the said Broward County Port Authority, is a public corporation of Florida and is the governing authority of the Broward County Port District and that as such it operates Port Everglades, a deep water harbor located on the southeast coast of the State of Florida [fol. 62] between the cities of Fort Lauderdale and Hollywood and that the said Port Everglades has a substantial foreign trade and is particularly interested in the importation of foreign cement; that the importation of said foreign cement at Port Everglades constitutes one of the greatest sources of revenue to the said Port and that since the passage, during the 1937 session of the Florida Legislature, of that certain Act known as Senate Bill No. 760, providing for the alleged inspection of cement imported and brought into the State of Florida from any foreign country, the said Port Everglades has been greatly damaged and its cement business virtually stopped.

2. That the above entitled cause, your petitioner has been informed, was started in the United States District Court in and for the Northern District of Florida and was moved to the United States Circuit Court of Appeals for the Fifth Circuit in New Orleans for the purpose of having a three-judge court pass upon the constitutionality of the Act above referred to. That your petitioner has received a copy of the

bill filed as above set forth, but has not been able to secure a copy of any answer which might have been filed by the defendants in this suit, and is, therefore, unable to allege and set forth any allegations in any answer which might have been filed in this cause.

3. That the bill of complaint filed herein as above set forth shows that the plaintiff is a corporation organized and existing under and by virtue of the laws of New York State and that said corporation is a citizen and resident of the said State of New York and that the defendants and each of them are citizens and residents of the State of Florida. That said bill of complaint sets up the legislative enactment by the 1937 Florida Legislature of its Senate Bill No. 760 providing for the alleged inspection of cement imported and brought into the State of Florida from any foreign country and attached to the said bill of complaint is a copy of said Act marked Exhibit "A". Said bill of complaint also sets up the fact that the plaintiff is an importer and large dealer in cement imported from Scandinavian countries and that said cement so imported is of a superior quality and complies in all respects with the stand-
[fol. 63] ard set up by the said legislative enactment above mentioned and that said cement so imported by said plaintiff has complied with said standards as therein set forth for a number of years last past.

4. Said bill of complaint also sets forth that said Act was passed to benefit a Florida corporation known as the Florida Portland Cement Company, which manufactures cement at Tampa, Florida, which organization is the only concern manufacturing cement in Florida at the present time. The plaintiff further alleges that said Act is unconstitutional and void and in violation of the Constitution of the United States of America in a number of respects therein set forth and said bill also sets forth that in the event said Act is enforced that said Act will prevent the plaintiff from making any sales of cement whatever in the State of Florida and cause its contracts in said State to be broken, to its immediate and irreparable injury.

5. That for the reasons above set forth, your petitioner is unable to set forth in this application the nature of the defense to be filed by the defendants in this suit, but that the undersigned attorney for your petitioner was informed by

an official of the Florida Portland Cement Company on the 17th day of November A. D. 1937, that a defense was being filed through the law firm of Whittaker & Whittaker of Tampa, Florida, who would be present in the City of New Orleans, Louisiana, before this Honorable Court on the 26th day of November A. D. 1937, at which time this matter is set down for hearing.

6. That your petitioner has an interest in the litigation in the above entitled cause against the defendants therein arising out of the fact that the Broward County Port Authority, the governing body of the Broward County Port District and Port Everglades, has a large business in dealing in foreign cement which has virtually stopped since the passage of the Act above mentioned and that the sailing of all vessels which were to bring cement into Port Everglades has been cancelled since the passage of said Act, as set forth in a copy of the bill of intervention of your petitioner which is attached hereto and made a part hereof and which your petitioner wishes to file in the above entitled cause after [fol. 64] first securing leave of this court.

7. That the interest of your petitioner in the above entitled cause is such that its intervention in this cause is necessary to the protection of its interests alleged in paragraph 6 hereof.

8. That copies of both your petitioner's bill of intervention and petition for leave to intervene have heretofore been mailed to the following: Martin H. Long, attorney for the plaintiff in the above action, 1309 Barnett National Bank Building, Jacksonville, Florida, Messrs. Whittaker & Whittaker, Attorneys at Law, Tampa, Florida, and Richard P. Daniel, Attorney for the State Road Department, Tallahassee, Florida, and it is respectfully requested that said bill of intervention be considered by the court as having been filed against both the original plaintiff and the defendants in said suit and that both be required to answer said bill of intervention *or* or before fifteen days after the filing of same and that your petitioner hereby offers to contribute to the expenses of said suit its just proportion thereof to an amount which the said court shall deem proper.

Wherefore, petitioner, having an interest in such matter herein, which is still in litigation and which will soon be

under consideration of this court, respectfully prays that an order may be entered herein permitting it to intervene and assert its interest in said suit in accordance with Equity Rule 37, such intervention to be in subordination to and in recognition of the propriety of the main proceeding and that your petitioner may have further relief in the premises as in equity it may be entitled to and as to this court may seem just and fit.

Dated this 24th day of November, A. D. 1937.

R. R. Saunders, Attorney for Petitioner, 808 Sweet Building, Fort Lauderdale, Florida.

[fol. 65] IN UNITED STATES DISTRICT COURT

BILL OF INTERVENTION OF BROWARD COUNTY PORT AUTHORITY —Filed December 1, 1937

The Intervener above named, by leave of the court first had and obtained, files this, its Bill of Intervention, against the above named respondents and says:

1. That Bimco Trading, Inc., a corporation of New York, the original plaintiff herein, filed its bill of com- herein on or about the — day of ——, A D. 1937, against A. B. Hale as Chairman, and E. A. McColskey, John Hughey Faulk, Brocks W. Bateman and James W. Perkins as and constituting the State Road Department of the State of Florida, defendants herein, to have declared unconstitutional, null, void, and of no further force and effect Senate Bill No. 760 passed in the 1937 session of the Florida Legislature, a copy of said senate bill being attached to and made a part of said original bill of complaint, which said bill of complaint stated among other things as follows:

That the plaintiff therein is a corporation organized and existing under and by virtue of the laws of New York State and that said corporation is a citizen and resident of the said State of New York and that the defendants and each of them are citizens and residents of the State of Florida. Said bill of complaint sets up the legislative enactment by the 1937 Florida Legislature of Senate Bill No. 760 providing for the alleged inspection of cement imported and brought into the state of Florida from any foreign corporation. Said bill of complaint also sets up the fact that

the plaintiff is an importer and large dealer in cement imported from Scandinavian countries and that said cement so imported is of a superior quality and complies in all respects with the standard set up by the said legislative enactment above mentioned and that said cement so imported by said plaintiff has complied with said standards as therein set forth for a number of years last past.

[fol. 66] That said bill of complaint also sets forth that said Act was passed to benefit a Florida corporation known as the Florida Portland Cement Company, which manufactures cement at Tampa, Florida, which organization is the only concern manufacturing cement in Florida at the present time. The plaintiff further alleges that said Act is unconstitutional and void and in violation of the Constitution of the United States of America in a number of respects therein set forth and said bill also sets forth that in the event said Act is enforced that said Act will prevent the plaintiff from making any sales of cement whatever in the State of Florida and cause its contracts in said State to be broken, to its immediate and irreparable injury.

2. That your petitioner has received a copy of the bill of complaint filed as above set forth, but has not been able to secure copy of any answer which might have been filed by the defendants in this suit, and is, therefore, unable to allege and set forth any allegations contained in any answer which might have been filed in this cause.

That the undersigned attorney for your intervener was informed by an official of the Florida Portland Cement Company on the 17th day of November, A. D. 1937, that a defense was being filed through the law firm of Whittaker & Whittaker of Tampa, Florida, who would be present in the City of New Orleans, Louisiana, before this Honorable Court on the 26th day of November, A. D. 1937, at which time this matter is set down for hearing.

3. That the Broward County Port Authority, intervener above named is a public corporation of Florida and is the governing authority of the Broward County Port District and that as such it operates Port Everglades, a deep water harbor located on the southeast coast of the State of Florida between the cities of Fort Lauderdale and Hollywood and that the said Port Everglades has a substantial foreign trade and is particularly interested in the importation of

foreign cement; that the importation of said foreign cement at Port Everglades constitutes one of the greatest sources of revenue to the said Port and that since the passage, during the 1937 session of the Florida legislature, of that cer- [fol. 67] tain Act known as Senate Bill No. 760 providing for the alleged inspection of cement imported and brought into the State of Florida from any foreign country, the said Port Everglades has been greatly damaged and its cement business virtually stopped.

That the intervener above named has an interest in the litigation in the above entitled cause against the defendants arising out of the fact that the Broward County Port Authority, the governing body of the Broward County Port District and of Port Everglades, has a large business in dealing in foreign cement which has virtually stopped since the passage of the act above mentioned and that the sailing of all vessels which were to bring cement into Port Everglades has been cancelled since the passage of said act; and that if said Senate Bill No. 760 of the 1937 Florida Legislature above referred to is allowed to stand it will greatly hamper the said Port Everglades, operated by your petitioner herein, in its foreign trade and that said bill so places a burden on foreign cement imported into said Port Everglades that it will stop all such foreign business and will cause the French Line, which now operates a regular freight service from Port Everglades, to cease its operations into Port Everglades.

That said act of the Florida Legislature above refer-ed to has been in effect about six weeks and has caused the revenues of the Broward County Port Authority to de-line at the rate of many thousand dollars a month and has caused labor payrolls at said Port to stop to the extent of about $3500.00 per month and has caused the customs collections at said Port Everglades to decline to the extent of about $5,000.00 per month.

4. That, furthermore, the above mentioned Act which is now sought to be declared unconstitu-ional, does not require any inspection or levy of any inspection fee upon any cement manufactured and sold and used in the State of Florida or imported into Florida from any other state of the United States, but only provides for the inspection of and payment of fees with respect to cement imported into the State of Florida from any foreign country; and that said

Act places a distinct burden upon commerce with foreign countries and is, therefore, void, because the Federal Con-
[fol. 68] stitution grants the Congress of the United States the power to regulate commerce with foreign countries in precisely the same language as it does commerce among the states and that a state statute such as the one above mentioned unlawfully discriminates against goods imported from foreign countries into Port Everglades and other ports of Florida.

5. That your intervener would further show unto the court that said state statute above mentioned is a tax and a duty laid upon a commodity, to wit: cement, in order to throttle competition with a domestic corporation of Florida and as illustrative of this fact your intervener shows that recently a shipment of cement was unloaded at Port Everglades consisting of 60,000 sacks containing 100 pounds each and that the inspection fee as provided in the state statute above mentioned of $3.00 per ton would have aggregated the sum of $9,000.00 to inspect this one shipment, when as a matter of fact, the actual cost of inspection on a basis of the largest cost possible for a thorough inspection of such cargo could not exceed the sum of $225.00, or approximately one-fortieth of the tax levied under said state statute.

6. Intervener refers to all the allegations in the original complaint herein, in so far as they are not inconsistent with the foregoing allegations and the claim of the intervener, and makes said allegations part of this complaint.

7. This intervening petitioner, desiring to prosecute this suit, as co-plaintiff with said Bimco Trading, Inc., as well as for itself, and to obtain all the relief sought and prayed for by said Bimco Trading, Inc., adopts and makes its own, in every respect and particular, each, every and all the allegations contained in said bill of complaint herein filed by Bimco Trading, Inc., and likewise adopts and makes its own the prayer of said bill of complaint, and prays that all the relief sought and prayed for by said Bimco Trading, Inc., be granted to this intervening petitioner, as well as to said Bimco Trading, Inc.

[fol. 69] 8. That this bill of intervention is filed in subordination to and in recognition of the propriety of the main

proceedings in accordance with Equity Rule No. 37, and your petitioner prays that in addition to the relief prayed for in the original bill of complaint filed herein that it may have such further relief in the premises as in equity it may be entitled to and as to this court may seem just and fit.

Wherefore, this plaintiff refers to, repeats and re-alleges the prayer for relief contained in the bill of complaint of Bimco Trading Inc., filed in the above entitled cause on or about ——, A. D. 1937, with the same force and effect as if said prayer for relief were herein set out at length, and prays that this plaintiff may have the benefit of any and all proceedings had in said above entitled cause.

R. R. Saunders, Attorney for Intervener, Broward County Port Authority, 808 Sweet Building, Fort Lauderdale, Florida.

Duly sworn to by H. G. La Bree. Jurat omitted in printing.

[fol. 70] Bond on injunction for $1,000.00, approved and filed December 3, 1937, omitted in printing.

[fol. 71] In United States District Court

Order Granting Broward County Port Authority, Authority to Intervene—November 26, 1937

[fol. 72] This Cause coming on to be heard on the 26th day of November A. D. 1937, on the petition of Broward County Port Authority, governing body of Broward County Port District, for leave to intervene in the above entitled suit and to be made a party plaintiff thereto and the petition having been duly considered and it appearing to the Court that the Broward County Port Authority, a public corporation of Florida, has an interest in the above entitled suit sufficient to warrant it to become a party to the suit,

It is therefore, hereby ordered, adjudged and decreed that said Broward County Port Authority be and it is hereby granted leave to intervene in said suit as a party plaintiff and to prosecute this cause in accordance with the prayer of its petition.

It is further hereby ordered, adjudged and decreed that service of a copy of said bill of intervention may be made by delivering a copy thereof — the attorneys for the original parties to this suit, That said bill of intervention when filed be considered as filed against the original plaintiff as well as the defendants and upon service of a copy of said bill of intervention upon them, both the original plaintiff and the defendants shall file answer thereto on or before fifteen days thereafter. That said Broward County Port Authority, as intervening plaintiff herein, be and it is hereby allowed 20 days from this date in which to file brief herein.

Done and Ordered in the city of New Orleans, Louisiana, on this the 26th day of November, A. D. 1937.

A. V. Long, District Judge of the above styled court.

[fol. 73] IN UNITED STATES DISTRICT COURT

ORDER ENTERING TEMPORARY INJUNCTION—Filed December 9, 1937

The President of the United States of America to A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and Constituting the State Road Department of the State of Florida, and Each of Them and to Their and Each of Their Servants, Agents, Attorneys, Employees, Workmen and Confederates, Greeting:

Whereas Bimco Trading, Inc., a corporation, plaintiff, in that certain cause now pending in the United States District Court for the Northern District of Florida in Equity, has filed a bill of complaint against the above named defendants and has obtained a temporary injunction as prayed for in the said bill of complaint,

Now therefore we, having regard for the matters in said bill of complaint contained, do hereby temporarily command and strictly enjoin you and each of you and your servants, agents, attorneys and employees and all persons acting in aid of or in conjunction with you or any of you, from enforcing or attempting to enforce the inspection provision of the Act of the Legislature of Florida known as Senate Bill #760 of the year A. D. 1937, which commands and injunctions you are respectfully required to observe and obey

until our said District Court shall make further order in the premises, and herein fail not under penalty of the law thence ensuing.

Witnesseth, the Hon. Franklin D. Roosevelt, as President of the United States of America: the Hon. Charles Evans Hughes, as Chief Justice of the Supreme Court of the United States of America; and the Hon. A. V. Long, as Judge of the United States District Court for the Northern District of Florida, in the City of Pensacola in the said Northern District of Florida on this the 3rd day of December, A. D. 1937.

W. Logan Hill, Clerk of the District Court for the Northern District of Florida. (Seal.)

[fol. 74] UNITED STATES MARSHAL'S RETURN

Received the within writ on the 5th day of December, 1937, at Marianna, Florida and executed the same on the 5th day of December, 1937, at Tallahassee, Florida by handing to and leaving with the within named A. B. Hale, as Chairman of the State Road Department of the State of Florida, a true and correct copy of this writ and at the same time I exhibited the original writ and made the contents of same known to him.

E. M. Sessoms, United States Marshal, by Adam M. Lewiss, Deputy.

December 8th, 1937.

IN UNITED STATES DISTRICT COURT

STIPULATION THAT MOTION TO DISMISS SHALL APPLY TO BILL AS AMENDED—Filed December 31, 1937

It is hereby agreed by and between the respective counsel of record for the Plaintiff and Defendants, that the motion to dismiss the bill of complaint filed herein on the 24th day of November, 1937, shall stand and apply to the bill of complaint as amended, except that counsel for the defendants hereby abandon the second ground of said motion by reason of the amendment to the bill of complaint.

This the 29th day of December, A. D. 1937.

Martin H. Long, Attorney for Plaintiff; Cary D. Landis, Attorney General; H. E. Carter, Assistant Attorney General; R. W. Erwin, Jr., Attorneys for the Defendants.

[fol. 75] IN UNITED STATES DISTRICT COURT

AMENDMENT TO BILL OF COMPLAINT—Filed January 6, 1938

Comes now the complainant in the above entitled cause, and amends its bill of complaint by adding thereto, the following paragraph:

19. The plaintiff further alleges that the amount involved herein, exceeds the sum of Three Thousand Dollars ($3000.00) exclusive of interest and costs.

M. H. Long, Attorney for Plaintiff.

Duly sworn to by M. H. Long. Jurat omitted in printing.

The defendants by the undersigned consent to the foregoing amendment to the bill of complaint.

This 28 day of December, A. D. 1937.

Cary D. Landis, Attorney General. H. E. Carter, Assistant Attorney General. R. W. Erwin, Jr., Attorney State Road Dept.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO DISMISS BILL OF COMPLAINT—March 8, 1938

[fol. 76] This case came on for hearing on a motion to dismiss the bill and was argued by counsel. The court being of the opinion that the motion is not well taken it is overruled and denied.

It is further ordered that defendants be allowed thirty days in which to answer.

This March 3rd, 1938.

Rufus E. Foster, U. S. Circuit Judge. Alexander Akerman, U. S. District Judge. A. V. Long, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

MOTION FOR DECREE PRO CONFESSO—Filed April 20, 1938

Comes now the plaintiff in the above entitled cause and moves the court to enter a decree pro confesso or default against the defendants herein, because of their failure to plead or answer to the bill of Complaint and amend-

ment thereto, filed herein, in accordance with the order of this court dated March 3rd, A. D. 1938.

Martin H. Long, Solicitor for Plaintiff.

Before me this April 18th, 1938. A. V. Long, Judge.

IN UNITED STATES DISTRICT COURT

CERTIFICATE THAT NO ANSWER OR OTHER PLEADING HAD BEEN FILED BY THE DEFENDANTS SINCE THE ORDER OF MARCH 3, 1938—Filed April 20, 1938

UNITED STATES OF AMERICA,
Northern District of Florida:

I, William Logan Hill, Clerk of the United States District Court for the Northern District of Florida, do hereby certify that no answer or other pleadings have been filed by the defendants in the case of Bimco Trading, Inc., vs. A. B. Hale et al., as Members of the State Road Department of the State of Florida (Case No. 27-E), since the order of this Court overruling their motion to dismiss heretofore filed herein.

[fol. 77] In Witness Whereof, I have hereunto set my hand and the seal of said court, at Tallahassee, Florida, this 9th day of April, A. D. 1938.

William Logan Hill, Clerk U. S. Dist. Court for Northern District of Fla., by R. B. Marsh, Deputy Clerk. (Seal.)

Before me this 18th day of April, 1938. A. V. Long, Judge.

IN UNITED STATES DISTRICT COURT

DEFAULT AND FINAL DECREE—June 14, 1938

This cause coming on this day to be heard on the motion of the plaintiff for the entry of a default or decree pro confesso against the defendants herein, and it appearing to the court and the court finding that the defendants have not filed any answer or other pleadings since the overruling of their motion to dismiss, by order of this court, dated March 3rd, A. D. 1938; and that the time for such pleading has elapsed; now therefore, it is,

Ordered, Adjudged and Decreed, that a Decree Pro Confesso be and the same hereby is entered against the said defendants; and that the bill of complaint and amendment thereto, be and the same are hereby taken as confessed; and the plaintiff further moving for the entry of a final decree herein, making permanent the interlocutory injunction heretofore issued herein, now therefore, upon consideration thereof, it is,

Ordered, Adjudged and Decreed, that the interlocutory injunction heretofore issued herein, be and the same is hereby made permanent, and the defendants, A. B. Hale, E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of the State of Florida, be and they hereby are permanently enjoined and forever restrained from enforcing or seeking to enforce the inspection provisions of that certain Act of the Legislature of the State of Florida, passed in 1937, and known as Senate Bill No. [fol. 78] 760, insofar as it relates to the inspection of cement imported into the State of Florida from foreign countries by the plaintiff; and it is further

Ordered, Adjudged and Decreed that the injunction bond given herein by the plaintiff, be and the same hereby is cancelled, and the plaintiff and its surety thereon, be and they are hereby jointly and severally, released and forever discharged from and on account of all liability thereon or thereunder.

Done and Ordered this 14 day of June, A. D. 1938.

Rufus E. Foster, United States Circuit Judge. Alexander Akerman, Judge of the United States District Court for the Southern District of Florida. A. V. Long, Judge of the United States District Court for the Northern District of Florida.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL UNDER SECTION 266 OF THE JUDICIAL CODE (U. S. C. A. TITLE 28, SECTION 380) FROM FINAL DECREE GRANTING PERPETUAL AND PERMANENT INJUNCTION—Filed September 6, 1938

A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins,

as and constituting the State Road Department of the State of Florida, defendants in the above cause, feeling aggrieved by the final order or decree of the statutory court invoked under Section 266 of Judicial Code, entered on the 14th day of June A. D. 1938, prays an appeal therefrom to the Supreme Court of the United States.

Wherefore, in order that A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins as and constituting the State Road Department of the State of Florida, defendants, may obtain relief in the premises, and for opportunity to show the errors complained of, pray that they may be allowed said appeal agreeable with the statutes and rules of the court in such case made and provided, that proper orders touching the securities required of them be made.

George Couper Gibbs, Attorney General of Florida; H. E. Carter, Assistant Attorney General; ——, Attorney for State Road Department, for the Defendants. Tom Whitaker, Pat Whitaker, of Counsel.

[fol. 79] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed September 6, 1938

Come now A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman, and James W. Perkins, as and constituting the State Road Department of the State of Florida, defendants in this cause, and file the following assignment of errors, upon which they will rely in the prosecution of the appeal from the final decree made and entered in this cause on the 14th day of June, A. D. 1938, and say that the court erred in the following respects:

First Assignment of Error: The Court erred in entering its order granting interlocutory injunction on November 27, 1937.

Second Assignment of Error: The Court erred in entering its interlocutory injunction on December 3, 1937—wherein it temporarily enjoined the defendants from enforcing or attempting to enforce the inspection provision of the Act of the Legislature of Florida, known as Senate Bill No. 760 in 1937.

Third Assignment of Error: The Court erred in entering its order on March 3rd, 1938, overruling defendants' motion to dismiss the bill of complaint.

Fourth Assignment of Error: The Court erred in entering its final decree on June 14, 1938, wherein it permanently enjoined and forever restrained the defendants from enforcing or seeking to enforce the inspection provisions of that certain Act of the Legislature of the State of Florida known as Senate Bill No. 760 of 1938.

Fifth Assignment of Error: The Court erred in not dismissing the bill of complaint.

Sixth Assignment of Error: The Court erred in granting its interlocutory injunction on December 3, 1937, and failing to make findings of fact and conclusions of law, which constituted the grounds of its action as required by Federal Equity Rule No. 70½, as amended.

Seventh Assignment of Error: The Court erred in entering its final decree on June 14, 1938, and failing to make [fol. 80] findings of fact and conclusions of law, as required by Federal Equity Rule No. 70½ as amended.

Eighth Assignment of Error: The Court erred in failing to hold that Section 265 of the Judicial Code, being Section 379, Title 28, U. S. C. A., prohibited the court from granting the injunctive relief as prayed in the bill of complaint.

Ninth Assignment of Error: The Court erred in overruling defendants' motion to dismiss bill of complaint on the ground that the court was without jurisdiction to grant the relief sought because of the prohibition contained in Section 265 of the Judicial Code, being Section 379, Title 28, U. S. C. A., since the granting of an injunction as prayed would have the effect of staying the proceeding then pending in the Supreme Court of Florida against these defendants, involving the validity of the Florida statute under attack in this cause.

Tenth Assignment of Error: The Court erred in overruling defendants' motion to dismiss bill of complaint on the ground there was no equity in the bill of complaint.

Eleventh Assignment of Error: The Court erred in overruling defendants' motion to dismiss bill of complaint on the

ground that under the allegations of the bill of complaint the State of Florida, acting through its Legislature had the power under Article I, Section 10, Clause 2, of the Constitution of the United States, to enact the Statute here under attack.

Twelfth Assignment of Error: The Court erred in overruling defendants' motion to dismiss the bill of complaint on the ground that, by the provisions of Article 1, Section 10, Clause 2, of the Constitution of the United States, the Congress of the United States, and not the Federal Courts, has the power to revise and control the Statute here under attack.

Thirteenth Assignment of Error: The Court erred in making and entering final decree herein on June 14, 1938, in favor of the plaintiff and against the defendants.

Wherefore, defendants pray that said final decree may be revised, and for such other and further relief as to the Court may seem just and proper.

[fols. 81-84] George Couper Gibbs, Attorney General of Florida; H. E. Carter, Assistant Attorney General; —— ——, Attorney for State Road Department, for the Defendants. Pat Whitaker, Tom Whitaker, of Counsel.

[fols. 85-86] In United States District Court

Order Allowing Appeal—September 6, 1938

This cause coming on this day to be heard upon the petition filed by A. B. Hale, as Chairman, and E. A. McColksey, John Hughey Faulk, Brooks W. Bateman, and James W. Perkins, as and constituting the State Road Department of the State of Florida, defendants, for an order allowing an appeal, and it appearing to the court that there was presented with said petition, assignments of error, and a separate typewritten statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the final decree in this cause, as required by Rule 12 of the Rules of the Supreme Court of the United States.

It is hereby ordered that the Appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the final order or decree rendered in this cause on the 14th day of June, A. D. 1938; that said defendants give a bond with good and sufficient security in the sum of $500.00 conditioned that they, as Appellants, shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, said bond to be [fol. 87] approved by this Court.

Done and Ordered this 6 day of September, A. D. 1938.

A. V. Long, Judge of the District Court of the United States in and for the Northern District of Florida.

Bond on Appeal for $500.00, approved and filed September 6, 1938, omitted in printing.

[fols. 88-89] Citation, in usual form, showing service on Martin H. Long et al., filed September 12, 1938, omitted in printing.

[fol. 90] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed September 6, 1938

To the Clerk of the Above Styled Court:

You will please prepare transcript of record in the above styled cause, to be filed in the Supreme Court of the United States, and included in said transcript of record the following papers, to wit:

1. Bill of complaint filed November 4, 1937.
2. Affidavit of A. B. Hale, filed November 9, 1937.
3. Certified copy of pleadings and opinion of Supreme Court of Florida in the case of State of Florida ex rel. Florida Portland Cement Company vs. A. B. Hale, as Chairman et al., before the Supreme Court of Florida, filed November 9, 1937.
4. Order denying temporary restraining order filed November 9, 1937.

5. Order convoking three judge court filed November 9, 1937.

[fol. 91] 6. Motion to dismiss bill of complaint filed November 24, 1937.

7. Notice of hearing filed November 27, 1937.

8. Unsworn statement of Allen J. Weaver filed November 27, 1937.

9. Affidavits of Carl W. J. Grimmelman F. E. Miller, N. W. Graves, P. H. Bates and Cordell Hull, all filed November 27, 1937.

10. Order granting interlocutory injunction filed November 27, 1937.

11. Petition for leave to intervene by Broward County Port Authority and bill of intervention filed December 1, 1937.

12. Injunction bond filed December 3, 1937.

13. Order granting Broward County Port Authority leave to intervene filed December 5, 1937.

14. Order entering temporary injunction with return showing service filed December 9, 1937.

15. Stipulation that motion to dismiss shall apply to bill as amended filed December 31, 1937.

16. Amendment to bill of complaint filed January 6, 1938.

17. Order overruling motion to dismiss bill of complaint filed March 8, 1938.

18. Motion for decree pro confesso filed April 20, 1938.

19. Certificate of Clerk that no answer or other pleading had been filed by the defendants since the order of March 3, 1938, filed April 20, 1938.

20. Default and final decree filed June 16, 1938.

21. Petition for appeal filed September 6th, 1938.

22. Assignments of Error filed September 6th, 1938.

23. Jurisdictional statement filed September 6th, 1938.

24. Order allowing appeal filed September 6th, 1938.

25. Bond for costs filed September 6th, 1938.

26. Citation to Appellee and proof of service thereof filed September 6th, 1938.

27. Proof of service upon Appellee of the following papers: (1) copy of petition for appeal; (2) copy of order allowing appeal; (3) copy of assignments of error; (4) copy [fol. 92] of jurisdictional statement; (5) statement directing attention of Appellee to the provisions of paragraph 3,

Rule 12 of the rules of the Supreme Court of the United States filed September 6, 1938.

28. These directions for making up the transcript of record showing service of Appellee.

George Couper Gibbs, Attorney General of Florida; H. E. Carter, Assistant Attorney General; ——, Attorney for State Road Department, for the Defendants. Pat Whitaker, Tom Whitaker, of Counsel.

Proof of service of the foregoing praecipe to the Clerk showing service on Martin H. Long, attorney for Bimco Trading, Inc. a corporation, and R. R. Saunders, attorney for Broward County Port Authority, a public corporation, plaintiffs (Appellees) in the above cause, was filed by the defendants on the 7th day of September, A. D. 1938.

[fol. 93] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 94] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed October 15, 1938

Now comes A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of Florida, appellants herein, by their undersigned attorneys, and set forth the following Statement of the Points on which they intend to rely in seeking a reversal of the Final Decree in this cause, to-wit:

First Point

The Court erred in entering its Order Granting Interlocutory Injunction on November 27, 1937.

[fol. 95] Second Point

The Court erred in entering its Interlocutory Injunction on December 3, 1937, wherein it temporarily enjoined the

appellants from enforcing, or attempting to enforce, the inspection provision of the Act of the Legislature of Florida, known as Senate Bill No. 760 of 1937.

Third Point

The Court erred in entering its Order on March 3, 1938, overruling appellants' Motion to Dismiss the Bill of Complaint.

Fourth Point

The Court erred in entering its Final Decree on June 14, 1938, wherein it permanently enjoined and forever restrained the appellants from enforcing, or seeking to enforce, the inspection provision of that certain Act of the Legislature of the State of Florida, known as Senate Bill No. 760, of 1937.

Fifth Point

The Court erred in not dismissing the Bill of Complaint.

Sixth Point

The Court erred in granting its Interlocutory Injunction on December 3, 1937, and failing to make findings of fact [fol. 96] and conclusions of law which constituted the grounds of its action, as required by Federal Equity Rule 70½ as amended.

Seventh Point

The Court erred in entering its Final Decree on June 14, 1938, and failing to make findings of fact and conclusions of law, as required by Federal Equity Rule 70½ as amended.

Eighth Point

The Court erred in failing to hold that Section 265 of the Judicial Code, being Section 379, Title 28, U. S. C. A., prohibited the Court from granting injunctive relief, as prayed in the Bill of Complaint.

Ninth Point

The Court erred in overruling appellants' Motion to Dismiss Bill of Complaint, on the ground that the Court was without jurisdiction to grant the relief sought, because of the prohibition contained in Section 265 of the Judicial

Code, being Section 379, Title 28, U. S. C. A., since the granting of an injunction as prayed, would have the effect of staying the proceeding then pending in the Supreme Court of Florida, against these appellants, involving the [fol. 97] validity of the Florida statute under attack in this cause.

Tenth Point

The Court erred in overruling appellants' Motion to Dismiss Bill of Complaint, on the ground there was no equity in the Bill of Complaint.

Eleventh Point

The Court erred in overruling appellants' Motion to Dismiss Bill of Complaint, on the ground that under the allegations of the Bill of Complaint, the State of Florida, acting through its Legislature, had the power, under Article I, Section 10, Clause 2, of the Constitution of the United States, to enact the statute here under attack.

Twelfth Point

The Court erred in overruling appellants' Motion to Dismiss the Bill of Complaint, on the ground that, by the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States, the Congress of the United States, and not the Federal Courts, has the power to revise and control the statute here under attack.

Thirteenth Point

The Court erred in making and entering Final Decree herein on June 14, 1938, in favor of the appellees, and against the appellants.

[fols. 98-99] The entire transcript of the record, as certified to by the Clerk of the District Court of the United States, in and for the Northern District of Florida, and filed in this cause, is deemed necessary to be printed for the consideration of the points above set out.

George Couper Gibbs, Attorney General of Florida; H. E. Carter, Assistant Attorney General, Attorneys for Appellants. Pat Whitaker, Tom Whitaker, of Counsel.

[fol. 100] STATE OF FLORIDA,
County of Leon, ss:

On this day personally appeared before the undersigned authority duly authorized to administer oaths, H. E. Carter, Assistant Attorney General of the State of Florida, who being first duly sworn, deposes and says that he did on this day serve a copy of the Statement of the Points on which appellants intend to rely in the above cause and of the parts of the record which appellants think necessary for the con-
[fols. 101-102] sideration thereof, upon Ma 'n H. Long, as attorney for the appellee, Bimco Trading, Inc., a corporation, and R. R. Saunders, as attorney for the appellee, Broward County Port Authority, a public corporation. The service was made by mailing said copies, sealed in envelopes addressed respectively to the said Martin H. Long, 1309 Barnett National Bank Building, Jacksonville, Florida, and to the said R. R. Saunders, 808 Sweet Building, Ft. Lauderdale, Florida, with sufficient postage thereon to insure delivery at destination, the same being mailed in the post office at Tallahassee, Florida, on this the 30th day of September, A. D. 1938.

H. E. Carter.

Sworn to and subscribed before me on this the 30 day of September, A. D. 1938. Erma K. Vason, Notary Public, State of Florida at large. My Commission expires Oct. 24, 1938. (Seal.)

[fol. 103] [File endorsement omitted.]

Endorsed on cover: File No. 42,903. N. Florida, D. C. U. S. Term No. 418. A. B. Hale, as Chairman, and E. A. McColskey et al., etc., appellants, vs. Bimco Trading, Inc., and Broward County Port Authority. Filed October 15, 1938. Term No. 418, O. T., 1938.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 418

A. B. HALE, AS CHAIRMAN, AND E. A. McCOLSKEY ET AL., ETC.,

Appellants.

vs.

BIMCO TRADING, INC., AND BROWARD COUNTY PORT AUTHORITY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

JURISDICTIONAL STATEMENT.

Now come A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of the State of Florida, appellants herein, and submit the following statement particularly disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the final decree

entered in this cause on the 14th day of June, A. D. 1938, wherein said defendants, as and constituting the State Road Department of the State of Florida, were permanently enjoined and forever restrained from enforcing or seeking to enforce that certain Act of the Legislature of the State of Florida, known as Senate Bill No. 760 of 1937, in the particulars set out in the final decree:

(a) The statutory provision believed by appellants to sustain the jurisdiction of the Supreme Court of the United States is Section 266 of the Judicial Code, the same being Section 380, of Title 28, of the United States Code Annotated.

(b) The validity of that certain Act of the Legislature of the State of Florida, known as Senate Bill No. 760 of 1937, is involved in this cause and said Act reads as follows: (Said Bill #760 of 1937 Legislature of the State of Florida is omitted for the reason that same appears in this record on pages 7 to 10, inclusive.)

The above and foregoing statute has not been printed in the bound volume by the Secretary of State, but was held by the Supreme Court of the State of Florida to be properly passed and became an effective law of the State of Florida, in the case of *State ex rel. Florida Portland Cement Company* v. *Hale et al.*, 176 So. 577, and is set out in full therein.

(c) The date of the final order or decree sought to be reviewed is June 14, A. D. 1938, and the date upon which the application for appeal is presented is the 6th day of September, A. D. 1938.

(d) The plaintiff, Bimco Trading, Inc. (one of the appellees), in this cause, is a corporation organized and existing under the laws of the State of New York, and a citizen and resident thereof, engaged in the importation of cement from the Kingdom of Denmark and Belgium into the State

of Florida, and in its said business, has contracts with citizens of the State of Florida, for the sale of cement imported by it and to be imported.

It is the duty of the State Road Department of the State of Florida to enforce the provisions of Senate Bill No. 760, Act of the Legislature of the State of Florida, 1937, which is quoted in full in paragraph 2 above, and to inspect all cement imported into the State of Florida from any foreign country and sold or offered for sale or to be used in the State of Florida, and to affix thereto evidence showing that said cement has been so inspected, and to collect therefor the inspection fees fixed by said Act. Said Act was passed by the Legislature of the State of Florida under the authority and power specifically reserved in the States by Article I, Section 10, Clause 2 of the Constitution of the United States, to lay imposts and duties on imports or exports, which may be absolutely necessary for executing its inspection laws. A mandamus action was brought against the defendants (appellants) in the Supreme Court of Florida to compel the enforcement of said Act, and said Supreme Court, on October 12, 1937, in denying motion to quash the alternative writ, held that said Act was properly and regularly passed and enacted by the Legislature of Florida, and was within the power of the Legislature of Florida to enact, the opinion of said Supreme Court being reported in *State ex rel. Florida Portland Cement Co.* v. *Hale et al.*, 176 So. 577, referred to *supra*.

While said mandamus proceeding was pending before said Supreme Court and its alternative writ outstanding against the defendants, the plaintiff, Bimco Trading, Inc., on November 4, 1937, filed its bill of complaint in the United States District Court in and for the Northern District of Florida, seeking to enjoin the defendants, as and constituting the State Road Department of Florida, from enforcing said

Act in the respects hereinabove mentioned, claiming that said Act was unconstitutional and void, because it conflicted with:

(1) Article 1, Section 8, of the Constitution of the United States, as this would constitute a direct burden on foreign commerce and would prohibit the importation in the State of Florida of a legitimate article of commerce.

(2) The 14th Amendment to the Constitution of the United States, as it denies to plaintiff the equal protection of the law and infringes on the right of contract.

(3) Article 1, Section 10 of the Constitution of the United States, as it levies an impost or duty on foreign commerce.

The plaintiff, Broward County Port Authority, a public corporation, was permitted to intervene in said cause as a party plaintiff on November 26th, 1937.

A three-judge statutory court convoked under Section 266 of the Judicial Code, being Section 380, Title 28, U. S. C. A. upon a hearing granted an interlocutory injunction which was filed November 27, 1937, restraining and enjoining the defendants, as and constituting the State Road Department of the State of Florida, from enforcing said Act in the respects above mentioned, which order also had the effect of enjoining the proceeding in said mandamus case pending before the Supreme Court of Florida hereinabove referred to, but made no findings of fact or conclusions of law, and rendered no opinion therein.

On June 14th, A. D. 1938, the court entered its final decree permanently and perpetually restraining and enjoining the defendants, as and constituting the State Road Department of the State of Florida, from enforcing said Act of the Legislature of the State of Florida, known as Senate Bill No. 760 of 1937, in the respects above pointed out. The court made no findings of facts or conclusions of law, and wrote no opinion therein.

This appeal involves the following substantial questions:

Question No. 1. Does not Section 265 of the Judicial Code, being Section 379, Title 28, of U. S. C. A., prohibit a United States District Court from enjoining the enforcement of a State statute, when the effect of such injunction is to stay proceedings in a state court?

Prior to the institution of this suit in the United States District Court in and for the Northern District of Florida, there had been instituted in the Supreme Court of the State of Florida a mandamus suit against these defendants, as and constituting the State Road Department of the State of Florida, to require them to enforce said statute, and said Supreme Court of Florida issued its alternative writ of mandamus, directed to these defendants, requiring them to show cause why said Act should not be enforced. These defendants filed in said mandamus proceedings their demurrer and motion to quash said alternative writ, challenging said Act, and the said Supreme Court of Florida, in passing upon said demurrer and motion to quash, denied the same and sustained said Act and allowed these defendants 10 days within which to file their answer or return to said alternative writ, and provided that in default thereof, peremptory writ would issue. With the record in said mandamus action in this status, plaintiff, on November 4, 1937, instituted this action in the United States District Court in and for the Northern District of Florida. Thereafter, injunctive orders as hereinabove set forth were entered. Defendants contend that the effect of the injunctions entered in this cause was to stay said mandamus proceeding pending and undisposed of in the Supreme Court of Florida, and that the entering of said injunction was a violation of said Section 265 of the Judicial Code, being Section 379 of Title 28, U. S. C. A.

Question No. 2. Does a State have the power, under Clause 2, Section 10, Article 1 of the Constitution of the United States to enact, through its legislature, a statute which fixes a minimum standard of an article of commerce and requires the inspection of and lays an inspection fee on such articles, when imported into said State from a foreign country, to pay the expenses of inspecting such imports?

Clause 2, Section 10, Article 1 of the Constitution of the United States, specifically reserves in the States the power to lay imposts or duties on imports or exports, which may be absolutely necessary for executing its inspection laws, and provides that the net produce therefrom shall be for the use of the Treasury of the United States, and that such laws shall be subject to the revision and control of the Congress. Defendants contend that under this Clause of the Constitution of the United States, the Legislature of the State of Florida was specifically authorized and empowered to enact the statute under consideration, and if the amount levied in the statute should exceed the costs of such inspection, the net produce must be accounted for to the Treasury of the United States, and that under the specific provisions of the Constitution, the control and revision of said statute is vested in the Congress, and therefore the court is not concerned with any claim of excessiveness of the inspection fees levied by said statute, and in addition to this, the Act was never put into operation and it has never been demonstrated that the fees levied by said statute will produce more than is absolutely necessary to pay the costs of such inspection.

The following cases are believed by appellants to sustain the jurisdiction of the Supreme Court of the United States in respect to this appeal, to wit:

Oklahoma Gas & Electric Co. et al. v. *Oklahoma Packing Co. et al.*, 292 U. S. 386, 54 S. Ct. 732;

Interstate Busses Corp. v. *Blodgett Tax Comr. of Conn. et al.*, 276 U. S. 245, 48 S. Ct. 230;

Clark v. *Poor*, 274 U. S. 554, 47 S. Ct. 702;
Smith v. *Wilson*, 273 U. S. 388, 47 S. Ct. 385;
Hays v. *Brown of Seattle et al.*, 251 U. S. 233, 40 S. Ct. 125.

The appellants here now submit that the Supreme Court of the United States has jurisdiction of this appeal and that the appellants are entitled to be heard as of right upon appeal, pursuant to Section 266 of the Judicial Code, being Section 380, Title 28, U. S. C. A.

GEORGE COUPER GIBBS,
Attorney General of Florida;
H. E. CARTER,
Assistant Attorney General,
For the Defendants.

PAT WHITAKER,
TOM WHITAKER,
Of Counsel.

FILE COPY

No. 418

FILED
OCT 15 1938
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

A. B. HALE, as Chairman and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and constituting the STATE ROAD DEPARTMENT OF THE STATE OF FLORIDA, *Appellants,*

vs.

BIMCO TRADING, INC., a corporation, and BROWARD COUNTY PORT AUTHORITY, a public corporation, *Appellees.*

Appeal from
The United States District Court for the Northern District of Florida

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BRIEF FOR APPELLANTS OPPOSING THE STATEMENT OF APPELLEES MAKING AGAINST THE JURISDICTION OF THE COURT AND THEIR MOTION TO DISMISS OR AFFIRM

GEORGE COUPER GIBBS
Attorney General of Florida
H. E. CARTER
Assistant Attorney General.
Tallahassee, Fla.
Attorneys for Appellants.

PAT WHITAKER
TOM WHITAKER
Tampa, Fla.
Of Counsel.

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In the Supreme Court of the United States

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and constituting the STATE ROAD DEPARTMENT OF THE STATE OF FLORIDA, *Appellants,*

vs.

BIMCO TRADING, INC., a corporation, and BROWARD COUNTY PORT AUTHORITY, a public corporation, *Appellees.*

BRIEF FOR APPELLANTS OPPOSING THE STATEMENT OF APPELLEES MAKING AGAINST THE JURIDICTION OF THE COURT AND THEIR MOTION TO DISMISS OR AFFIRM

The defendants in the court below are here the appellants, and the plaintiffs are the appellees, and will be so referred to.

On September 6, 1938, the appellants applied by Petition to the United States District Court for the Northern District of Florida, for an Order allowing an appeal from the Final Decree rendered, on the 14th day of June, 1938, by a three-judge court convoked under Section 266 of the Judicial Code, being Section 380, Title 28, U. S. C. A., in that cause then pending in said court, wherein the appellees here were plaintiffs, and the appellants were defendants,

the Petition for allowance of appeal appears at page 78 of the typewritten transcript of the record.

On September 6, 1938, an Order was entered by the Judge of the United States District Court for the Northern District of Florida, allowing an appeal from the Said Final Decree of June 14, 1938, which Order appears at page 86 of the typewritten transcript of the record.

With the Petition for the allowance of an appeal, appellants filed their Jurisdictional Statement, in compliance with Rule 12 of the revised Rules of the Supreme Court of the United States, which Statement appears at page 81 of the typewritten transcrip of the record.

On September 21, 1938, appellants were served with a copy of a paper filed in this cause by appellees, designated as "Statement making against Jurisdiction and Motion to Dismiss or Affirm", purporting to be filed in accordance with the provisions of Paragraph 3, Rule 12, of said Rules of the Supreme Court of the United States.

The said Jurisdictional Statement shows:

(a) That the Final Decree appealed from was rendered by a three-judge court convoked under Section 266 of the Judicial Code (Sec. 380, Title 28 U. S. C. A.), in which the appellants, as State officers, were enjoined and restrained from enforcing, or attemptiug to enforce, the provisions of a State statute of Florida. By Section 266 of the Judicial Code (Sec. 380, Title 28 U. S. C. A.) it is provided that "the requirements respecting the presence of three judges shall also apply to the final hearing in such suit in the District Court; and a direct appeal to the Supreme Court may be taken from a Final Decree granting or denying a permanent injunction in such suit."

(b) The statute, the validity of which is involved in the Final Decree appealed from, was enacted by the

Legislature of Florida, at its regular session in 1937, but was not printed in the bound volume of the Acts of the Legislature of 1937, but is on file in the office of the Secretary of State of the State of Florida and was, by the Supreme Court of Florida, held and adjudged to have been properly passed, and that it became effective as a law of the State, in the case of STATE, ex rel. *FLORIDA PORTLAND CEMENT COMPANY v. HALE, ET AL.*, 129 Fla. 588, 176 So. 577, and is set out in full in the opinion of the Court in said case, and is also set out verbatim in said Jurisdictional Statement.

(c) Said Jurisdictional Statement gives the date of the Final Decree sought to be reviewed by the appeal, and the date upon which the application for appeal was presented to the District Court.

(d) Said Jurisdictional Statement contains a concise statement of the history and nature of the case, and shows that the rulings of the court below were such as to bring the case within the provisions of Section 266 of the Judicial Code (Sec. 380, Title 28 U. S. C. A.), and includes a statement of the points or grounds upon which appellants contend the questions are substantial, and decisions of this Court are cited, which are believed by appellants to sustain the jurisdiction of the Court under Sec. 266 of the Judicial Code (Sec. 380, Title 28 U. S. C. A.)

(e) The appellants did not append to the Jurisdictional Statement a copy of any opinion delivered by the court below upon the rendering of the Final Decree sought to be reviewed, nor any earlier opinions in the same case, because none were rendered, and this is pointed out in said Jurisdictional Statement.

Obviously, therefore, the Jurisdictional Statement complies fully, and in every respect, with the requirements of Rule 12 of the revised Rules of this Court, and it is contended, on behalf of appellants, that the questions involved,

as set out in said Jurisdictional Statement, are substantial, and that it clearly appears that this Court has jurisdiction of the appeal.

The so-called statement of appellees making against jurisdiction does not disclose any matter or ground making against the jurisdiction of this Court, claimed by the appellants in their Jurisdictional Statement. It consists merely of a statement of the history of this case and a purported statement of the history of the mandamus case of STATE, ex rel. *FLORIDA PORTLAND CEMENT COMPANY v. A. B. HALE, ET AL.*, 129 Fla. 588, 176 So. 577, pending in the Supreme Court of Florida at the time of the institution of this suit and of the granting of the Interlocutory Injunction, in which was involved the same statute as is involved in this case. Instead of the said statement disclosing matters or grounds making against the jurisdiction of this Court, as claimed in appellants' Jurisdictional Statement, the history of the case, contained in said statement, rather makes for the jurisdiction of this Court, by showing that the case should be heard on its merits, rather than on a motion to dismiss or affairm. In making the purported statement of the history of the mandamus case of STATE, ex rel. *FLORIDA PORTLAND CEMENT COMPANY, v. A. B. HALE, ET AL.*, supra, appellees, in their so-called statement making against the jurisdiction of this Court, have gone outside the record in this case, to state that on the 19th day of November, A. D. 1937, the Supreme Court of Florida issued a Peremptory Writ of Mandamus in said case. The making of that statement was an attempt to make it appear that the said mandamus action had terminated and was not pending in the Supreme Court of Florida on the 26th day of November, 1937, when the three-judge court granted an Interlocutory Injunction in this cause. It is true, as a matter of record in the files of the Supreme

Court of Florida, that a Peremptory Writ of Mandamus was issued against these appellants on the 19th day of November, 1937, but that fact does not appear in this record. The appellees, however, did not go out of this record to disclose to this Court the fact that the Supreme Court of Florida, on the 9th day of December, 1937, upon the motion of attorneys for these appellants, who were defendants in the mandamus action in the Supreme Court of Florida, made and entered its Order Staying Further Proceedings in said mandamus action, because of the conflict between the command of the Peremptory Writ of Mandamus issued by the Supreme Court of Florida, on the 19th day of November, 1937, commanding these appellants, as and constituting the State Road Department of Florida, to enforce the provisions of the Act here involved, on the one hand, and the Interlocutory Injunction of the Federal three-judge court, entered on the 26th day of November, 1937, enjoining and restraining these appellants, as and constituting the State Road Department of Florida, from enforcing the provisions of the said Act here involved, on the other hand. An attested copy of the said Stay Order of the Supreme Court of Florida, dated December 9, A. D. 1937, in the said mandamus action, is attached hereto as Exhibit "A", for the information of the Court. While we admit the entry of the Peremptory Writ by the Supreme Court of Florida, in the mandamus action, on November 19, 1937, we think it but fair that this Court be informed as to the further action of the Supreme Court of Florida, at a date subsequent to the entry of the Interlocutory Injunction by the Federal three-judge court, in order that this Court may determine whether the mandamus action was pending in the Supreme Court of Florida, and undisposed of, at the time of the institution of this suit, and on the date of the entry of the Interlocutory Injunction. The Stay Order stands unrevoked at this date, and it is our contention that

the mandamus action is still pending and undisposed of. Obviously, these appellants could not obey both the Peremptory Writ of Mandamus, commanding them to enforce the provisions of the Act here involved, and the Interlocutory Injunction or Final Decree, enjoining them from enforcing the provisions of said Act, and it was for the purpose of relieving them of the contradiction of those judgments, that their counsel applied for and obtained a stay of the proceedings in the mandamus case until the appeal in this case could be determined. It needs no argument to demonstrate that if the mandamus action had not been pending in the Supreme Court of Florida on the 9th day of December, 1937, that court would have had no jurisdiction to have entered the Stay Order.

If the Interlocutory Injunction or the Final Decree of the Federal three-judge court appealed from had the effect of staying the proceedings in the mandamus case then pending in th Supreme Court of Florida, then the granting of said Interlocutory Injunction and the entry of the Final Decree appealed from, were in violation of Sec. 265 of the Judicial Code (Sec. 379, Title 28, U. S. C. A.), and that presents a substantial question to be passed upon by this Court, on this appeal. We think no argument is required to demonstrate that the injunctive orders of the Federal three-judge court did have the effect of staying the proceedings in the mandamus action then pending in the Supreme Court of Florida, because the provisions of the Interlocutory Injunction and of the Final Decree are in direct conflict with the commands of the Peremptory Writ of Mandamus issued by the Supreme Court of Florida on November 19, 1937. The appellants here were defendants in both cases, wherein the identical statute was involved; and counsel for and on behalf of, and at the instance and request of, Broward County Port Authority, one of the ap-

pellees here, filed a Petition to Intervene in said Mandamus proceedings, and also filed a Petition for Rehearing therein. (See Petition at p. 35, and Certificate of the Clerk of the Supreme Court of Florida at p. 40, of the typewritten transcript of the record herein).

Under paragraph (b) of appellees' statement the contention is made that the enforcement of the act here involved would violate certain treaties and trade agreements entered into between the United States and certain foreign countries. There is no allegation in the Bill of Complaint to the effect that the enforcement of said Act would violate any treaty or trade agreement entered into between the United States and any foreign country, and this question was, for the first time, attempted to be injected in this case by the introduction of an ex parte affidavit at the hearing before the Federal three-judge court, on the application of appellees for an Interlocutory Injunction. The issues involvd in this case are clearly defined and limited by the allegations of the Bill of Complaint, as set forth in paragraph 18 thereof, wherein it is alleged that the said Act is unconstitutional and void, and in violation of the Constitution of the United States, in the respects therein designated, none of which relate to the question sought to be raised here by paragraph (b) of said statement. If the question here sought to be raised were an issue in this case, such question would relate to the merits of the case, rather than to the jurisdiction of the Court.

The only other contention made in appellees' statement is that found in paragraph (c), where it is said that the only real questions involved in this appeal have been previously decided by this Court. As a matter of fact, none of the cases cited by appellees go to the question of jurisdiction. In the first three cases cited the Court had under

consideration statutes which were held to be unconstitutional because they discriminated between the States and imposed burdens on interstate commerce not permitted by the Constitution of the United States. These cases have no bearing upon the questions involved in this appeal, for the reason that the statute now before the Court deals with a classification made by the Constitution itself. The other three cases cited by appellees in their said statement involve the question of the effect of the failure of the District Court to observe the requirements of Rule 70½ of the Rules of this Court in granting Interlocutory Injunctions and, certainly, cannot affect the jurisdiction of this Court to hear the appeal.

We respectfully direct the Court's attention to the cases cited in appellants' Jurisdictional Statement, where this Court, in passing upon the jurisdiction of this Court to hear direct appeals in cases such as is involved in this appeal, has consistently stated the rule to be:

> "The application for the preliminary injunction having been pressed to a determination before the court of three judges, the case is properly here on direct appeal from the final decree of that court."

We respectfully submit to the Court that the questions involved in this appeal are substantial, and that this Court has jurisdiction under the law and rules applicable thereto.

In conclusion, we would direct the Court's attention to the following cases:

> STATE OF FLORIDA, ex rel. *FLORIDA PORTLAND CEMENT COMPANY v. A. B. HALE, ET AL.*, as and constituting the STATE ROAD DEPARTMENT OF FLORIDA,
> 129 Fla. 588, 176 So. 577;

NEILSON v. GARZA,
17 F. Cases 1302, Case No. 10,091, (2 Woods 287);
BROWN, ET AL. v. MARYLAND,
12 Wheat. text 436; 6 L. Ed. 685;
PATAPSCO GUANO COMPANY v. BOARD OF AGRICULTURE,
171 U. S. 345, 18 S. Ct. 862, 43 L. Ed. 193;
NEW MEXICO, ex rel. *McLEAN v. DENVER & P.G.R. COMPANY,*
203 U. S. 38, 27 S. Ct. 1, 51 L. Ed. 85;
RED "C" OIL MANUFACTURING COMPANY v. BOARD OF AGRICULTURE,
222 U. S. 380, 32 S. Ct. 152, 56 L. Ed. 240;

which support appellants' contention, in this appeal, as to the validity of the statute involved herein, and clearly demonstrate that the questions involved in this appeal are substantial, and the Motion to Dismiss or Affirm, filed by appellees, should be denied.

Respectfully submitted,

GEORGE COUPER GIBBS,
Attorney General of Florida.

H. E. CARTER,
Assistant Attorney General
Attorneys for Appellants.

PAT WHITAKER

TOM WHITAKER
Of Counsel.

IN THE SUPREME COURT OF FLORIDA,
JUNE TERM A. D. 1937,
Thursday, December 9, A.D. 1937

STATE OF FLORIDA, ex rel FLORIDA PORTLAND CEMENT COMPANY, a corporation,
Relator,
-vs-
A. B. HALE, as Chairman and E. A. McCLOSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and constituting the State Road Department of the State of Florida,
Respondents.

ORIGINAL JURISDICTION
MANDAMUS

This cause having been submitted to the Court upon the motion of the Attorneys for the State Road Department for a Stay Order pending the appeal of the subject matter herein involved, to the United States Supreme Court in which its motion has been duly considered, it is thereupon ordered and adjudged by the Court that the said motion be granted and that all further proceedings and actions taken pursuant to the peremptory writ of Mandamus heretofore issued in this cause, be and the same is hereby stayed until the final decision of the Supreme Court of the United States upon the constitutionality of the act involved in this cause and until the further order of this Court.

A true copy,
TEST:
(s) G. T. WHITFIELD,
Clerk Supreme Court of Florida.

(Seal, Supreme Court of the State of Florida)

EXHIBIT "A"

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 9 1939
CHARLES ELMORE CROPLEY
CLERK

In The
Supreme Court of the United States

October Term, 1938.

No. 418

A. B. HALE, as Chairman and E. A. McCOLSKEY et al., etc., Appellants,

vs.

BIMCO TRADING, Inc., and BROWARD COUNTY PORT AUTHORITY, Appellees.

Appeal from the United States District Court of the Northern District of Florida

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BRIEF ON BEHALF OF APPELLANTS

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In the Supreme Court of the United States

October Term 1938, No. 418

A. B. HALE, as Chairman and
E. A. McCOLSKEY, et al as and constituting the
STATE ROAD DEPARTMENT OF
THE STATE OF FLORIDA,

Appellants,

vs.

BIMCO TRADING, INC., et al,

Appellees.

REFERENCE TO OFFICIAL REPORT OF THE OPINION OF THE LOWER COURT

No opinion was delivered by the lower court in this case. However, the statute involved in this proceeding was passed upon by the Supreme Court of the State of Florida in the case of State ex rel. Florida Portland Cement Company vs. Hale et al 129 Florida 588, 176 Southern 577.

STATEMENT OF THE CASE

This is an appeal from a final decree entered in the United States District Court in and for the Northern District of Florida by a three judge Federal Court convoked under Section 266 of the Judicial Code (Title 28, Section 380, U.S.C.A.) whereby the Appellants, as and constituting the State Road Department of the State of Florida, were enjoined and restrained from enforcing or attempting to enforce the provisions of a state statute of Florida known as Senate Bill No. 760 of the Legislature of Florida of 1937 (R. 66).

The Bill of Complaint was filed in this case on November 4th, 1937 in the United States District Court in and for the Northern District of Florida (R. 1) and came on for hearing before said court on application for a temporary restraining order on the 9th day of November, 1937, and the court denied the application for a temporary restraining order (R. 38). On the same date the District Judge entered an order convoking a three judge Federal Court under Section 266 of the Judicial Code (Title 28, Section 380 U.S.C.A.) for the hearing and determination of the application for interlocutory injunction applied for in said cause to be held on the 26th day of November, 1937 (R. 38). On November 24, 1937 the Appellants filed their motion to dismiss the Bill of Complaint (R. 40). On November 26, 1937 the Appellee, Broward County Port Authority, was granted leave to intervene in said suit as a party Plaintiff. On November 27, 1937 a hearing was had before the court convoked under Section 266 of the Judicial Code upon application for an interlocutory injunction, the Bill of Complaint, Affidavits in support thereof and the affidavit and exhibits filed by Appellants. The court granted the interlocutory injunction enjoining and restraining Appellants from enforcing the terms and provisions of said Senate Bill 760, Laws of Florida of 1937 (R. 54), but did not take up for hearing or pass upon the motion to dismiss the Bill of Complaint which was then pending in said cause. On December 3rd, 1937 the court issued interlocutory injunction enjoining and restraining the Appellants from enforcing or attempting to enforce the inspection provisions of the Act of the Legislature of Florida known as Senate Bill No. 760 of the year A.D. 1937 (R. 63) (See copy of Act attached hereto as Appendix A). No opinion was filed in connection with entry of the interlocutory injunction. On January

6, 1938, an amendment was filed to the Bill of Complaint which was consented to by Appellants (R. 65). On March 3, 1938 the court, after hearing arguments, entered its order overruling and denying the motion to dismiss the Bill of Complaint (R. 65). On June 14, 1938, the court on motion entered default or decree pro confesso against Appellants and entered its final decree granting a permanent injunction and restraining the Appellants from enforcing or attempting to enforce the inspection provisions of said Act of the Legislature of the State of Florida passed in 1937 and known as Senate Bill No. 760, which permanent injunction followed the terms of the interlocutory injunction (R. 66). The court filed no opinion in connection with the entry of the final decree.

The pleadings and exhibits filed in this cause show the following facts:

The Appellee, Bimco Trading, Inc., is a corporation organized and existing under the Laws of the State of New York and a citizen and resident thereof engaged in the importation of cement from the Kingdoms of Denmark and Belgium into the State of Florida and in its said business has contracts with citizens of the state of Florida for the sale of cement imported by it and to be imported (R. 1).

It is the duty of Appellants as and constituting the State Road Department of the State of Florida to enforce the provisions of that certain Act of the Legislature of the State of Florida passed in 1937 and known as Senate Bill No. 760, which is set out in full in Appendix A, and to inspect all cement imported into the State of Florida from any foreign country and sold or offered for sale or to be

used in the State of Florida and to affix thereto evidence showing that the said cement has been so inspected and to collect therefor the inspection fees fixed by said Act (R. 1).

On the 29th day of July, 1937, a mandamus action was brought against Appellants in the Supreme Court of Florida to compel the enforcement of the provisions of said Act (R. 36) and the said Supreme Court on said 29th day of July, 1937, issued and granted its alternative writ of mandamus directed to Appellants (R. 10). Appellants in compliance with and in obedience to said alternative writ of mandamus filed their demurrer or motion to quash said alternative writ of mandamus (R. 15) and thereafter briefs were duly filed by the parties and the cause was orally argued before the Supreme Court of Florida. On the 12th day of October, 1937, the Supreme Court of Florida handed down its decision, judgment and opinion overruling and denying said demurrer or motion to quash filed by said Appellants (R. 17). On November 1, 1937, the Appellee, Broward County Port Authority, by and through its attorneys R. R. Saunders and Dwight L. Rogers filed in the Supreme Court of Florida its petition to intervene in said mandamus proceedings as amicus curiae and also filed petition for rehearing in said cause (R. 30 and 37). With the record in the mandamus case brought against these Appellants in the Supreme Court of Florida standing in this condition the Bill of Complaint in this cause was on November 4, 1937, filed in the District Court of the United States for the Northern District of Florida; and thereafter the three judge Federal Court granted the injunctions as hereinabove set forth.

Prior to the entry of the interlocutory injunction by

said three judge Federal Court on November 27, 1937, Appellants had filed in this cause a certified copy of the pleadings and opinion of the Supreme Court of Florida in said mandamus proceeding showing the pendency and progress of said cause in the Supreme Court of the State of Florida (R. 9) and had also filed an affidavit of A. B. Hale as Chairman of the State Road Department which set forth and stated that he as such Chairman, had caused an investigation to be made for the purpose of determining what the cost would be of conducting and carrying out the inspection of cement manufactured in foreign countries and imported into Florida as provided for in said Act of the 1937 session of the Florida Legislature known as Senate Bill No. 760, which is under attack, and that such investigation showed, and in the opinion of said A. B. Hale, 15 cents per hundred pounds as levied and provided in said Act as the inspection fee would be absolutely necessary to defray all of the expenses incident, essential and necessary to conduct and carry out the inspection as provided in said Act; and that the Act had not been put into operation pending the determination of said mandamus action pending in the Supreme Court of Florida (R. 9).

The Appellees filed, prior to the entry of said interlocutory injunction, a statement of Allen J. Weaver and affidavits of Carl W. J. Grimmelman, F. E. Miller, N. W. Graves and P. H. Bates, the effect of which statement and affidavits was that the cement imported by Appellee Bimco Trading Inc., was of good grade and that the inspection which had theretofore been made of imported cement had cost an infinitesimal amount in comparison to the amount of inspection fees levied in said Act (R. 42-47).

Appellees also filed an affidavit of the Honorable Cordell Hull, Secretary of State of the United States which,

stated briefly, sets forth that a reciprocal trade agreement had been entered into between the United States of America and the Belgo-Luxemburg Economic Union under the authority of the so-called Trade Agreements Act which amended the Tariff Act of 1930 by adding at the end of title 3 thereof, Section 350 (U.S. Code, Title 19, Section 1351; 48 Stat. 943) and that during the year 1936 the only full calendar year during which said Trade Agreement had been in effect, twenty-one per cent of the total imports of cement into the United States were entered in the Florida district and that approximately seventy per cent of the cement imported into Florida is supplied by Belgium; that the Belgium government had protested to the Department of State against the Florida inspection fee provided for under the Act of the Legislature of 1937, under attack in this cause, and that in view of the importance of Florida as a market for imported cement the inspection fee levied by said Act on cement of foreign manufacture is likely to nullify largely the concession granted in said Trade Agreement (R. 47-54).

It is contended by the Appellees in their Bill of Complaint that said Act of the Legislature of Florida of 1937, known as Senate Bill No. 760, is unconsitutional and void because it conflicts with:

First. Article I, Section 8 of the Constitution of the United States as this would constitute a direct burden on foreign commerce and would prohibit the importation into the State of Florida of a legitimate article of commerce.

Second. The 14th Amendment to the Constitution of the United States as it denies to plaintiff the equal protection of the law and infringes on the right of contract; and

Third. Article I, Section 10 of the Constitution of the United States as it levies an impost or duty on foreign commerce (R. 4).

Appellants contend that the action of the Federal three judge Court in granting the injunctions hereinabove set out violated Section 265 of the Judicial Code, being Section 379, Title 28 of U.S.C.A., because the mandamus action against these Appellants was pending in the Supreme Court of Florida at the time said injunctions and the final decree were entered in this cause and the effect of said injunctions and final decree entered in this cause is to stay said mandamus proceedings which was then pending and undisposed of in the Supreme Court of Florida.

Appellants further contend that the said Act of the Legislature of Florida of 1937, known as Senate Bill No. 760, was enacted under and by virtue of Article I, Section 10, Clause 2 of the Constitution of the United States which specifically reserves in the states the power to levy imposts or duties on imports or exports which may be absolutely necessary for executing its inspection laws and the Constitution itself makes provision that the net produce therefrom shall be for the use of the Treasury of the United States and that such laws shall be subject to the revision and control of the Congress. Any claim of excessiveness of the inspection fees levied by such statute must be passed upon by the Congress and not by the Courts. In addition to this, said Act has never been put into operation and it has never been demonstrated that the fees levied by said statute will produce more than is absolutely necessary to pay the costs of such inspection.

SPECIFICATION OF SUCH OF THE ASSIGNED ERRORS AS ARE INTENDED TO BE URGED

FIRST ASSIGNMENT OF ERROR

The Court erred in entering its order granting interlocutory injunction on November 27, 1937.

SECOND ASSIGNMENT OF ERROR

The Court erred in entering its interlocutory injunction on December 3, 1937, wherein it temporarily enjoined the defendants from enforcing or attempting to enforce the inspection provision of the Act of the Legislature of Florida, known as Senate Bill No. 760 in 1937.

THIRD ASSIGNMENT OF ERROR

The Court erred in entering its order on March 3rd, 1938, overruling defendants' motion to dismiss the bill of Complaint.

FOURTH ASSIGNMENT OF ERROR

The Court erred in entering its final decree on June 14, 1938, wherein it permanently enjoined and forever restrained the defendants from enforcing or seeking to enforce the inspection provisions of that certain Act of the Legislature of the State of Florida known as Senate Bill No. 760 of 1937.

FIFTH ASSIGNMENT OF ERROR

The Court erred in not dismissing the bill of complaint.

SIXTH ASSIGNMENT OF ERROR

The Court erred in granting its interlocutory injunction on December 3, 1937, and failing to make findings of

fact and conclusions of law, which constituted the grounds of its action as required by Federal Equity Rule No. 70½, as amended.

SEVENTH ASSIGNMENT OF ERROR

The Court erred in entering its final decree on June 14, 1938, and failing to make findings of fact and conclusions of law, as required by Federal Equity Rule No. 70½, as amended.

EIGHTH ASSIGNMENT OF ERROR

The Court erred in failing to hold that Section 265 of the Judicial Code, being Section 379, Title 28, U.S.C.A., prohibited the court from granting the injunctive relief as prayed in the bill of complaint.

NINTH ASSIGNMENT OF ERROR

The Court erred in overruling defendants' motion to dismiss bill of complaint on the ground that the court was without jurisdiction to grant the relief sought because of the prohibition contained in Section 265 of the Judicial Code, being Section 379, Title 28, U.S.C.A., since the granting of an injunction as prayed would have the effect of staying the proceeding then pending in the Supreme Court of Florida against these defendants, involving the validity of the Florida statute under attack in this cause.

TENTH ASSIGNMENT OF ERROR

The Court erred in overruling defendants' motion to dismiss bill of complaint on the ground there was no equity in the bill of complaint.

ELEVENTH ASSIGNMENT OF ERROR

The Court erred in overruling defendants' motion to dismiss bill of complaint on the ground that under the allegations of the bill of complaint the State of Florida, acting through its Legislature had the power under Article I, Section 10, Clause 2, of the Constitution of the United States, to enact the Statute here under attack.

TWELFTH ASSIGNMENT OF ERROR

The Court erred in overruling defendants' motion to dismiss the bill of complaint on the ground that, by the provisions of Article I, Section 10, Clause 2, of the Constitution of the United States, the Congress of the United States, and not the Federal Courts, has the power to revise and control the Statute here under attack.

THIRTEENTH ASSIGNMENT OF ERROR

The Court erred in making and entering final decree herein on June 14, 1938, in favor of the plaintiff and against the defendants.

All assignments of error will be argued under each question as hereinabove set out. The Court is requested to consider the argument under each question as severally applicable to each of the assignments of error.

STATEMENT OF QUESTIONS INVOLVED

FIRST QUESTION

Does not Section 265 of the Judicial Code, being Section 379, Title 28, U.S.C.A., prohibit a United States Dis-

trict Court from granting an injunction against state officers to prevent the enforcement of a state statute after a mandamus proceeding has been instituted and is pending in the Supreme Court of such State to compel such state officers to enforce the identical state statute?

SECOND QUESTION

Does a State have the power under Article I, Section 10, Clause 2, of the Constitution of the United States to enact, through its Legislature, a statute which fixes a minimum standard of an article of commerce when used in such State, and requires the inspection of such articles when imported into such State from a foreign country and lays an inspection fee thereon to pay the expenses of inspecting such imports?

ARGUMENT ON FIRST QUESTION

Section 265 of the Judicial Code, being Section 379 of Title 28 U.S.C.A., provides as follows:

> "The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

We respectfully call to the Court's attention the fact that on the 29th day of July, 1937, petition for mandamus was filed in the Supreme Court of the State of Florida, by State of Florida ex rel. Florida Portland Cement Company, a Corporation, Relator vs. the Appellants here, as and constituting the State Road Department of the State of Florida, respondents, and based on said petition the Supreme Court on the same day issued and granted its alternative

writ of mandamus directed to Appellants requiring Apellants to show cause, if any they could, why peremptory mandamus should not be issued requiring the Appellants to inspect all cement imported into the State of Florida from any foreign country and sold, offered for sale or to be used in the State of Florida and affix thereto evidence showing that said cement had been inspected and collect therefor the inspection fees fixed in said Act, being the requirements of said statute of the Legislature of Florida, 1937, known as Senate Bill No. 760; thereafter the Appellants in compliance with and obedience to said alternative writ of mandamus filed a demurrer or motion to quash said alternative write of mandamus; briefs were duly filed and said cause was orally argued before the said Supreme Court of Florida and on the 12th day of October, 1937, the said Supreme Court of Florida handed down its decision, judgment and opinion overruling and denying said demurrer or motion to quash filed by Appellants and in said opinion the Supreme Court of Florida sustained said Act of the Legislature of Florida of 1937, known as Senate Bill No. 760, and held that it was a legal and valid law of the State of Florida; and allowed Appellants ten days within which to file an answer or return in said cause. Appellants filed no answer or return in said cause but filed a petition for rehearing and subsequently filed a praecipe for withdrawal of said petition for rehearing. All of which was pending before the Supreme Court of Florida and undisposed of on the 8th day of November, 1937.

On November 1, 1937, R. R. Saunders and Dwight L. Rogers, members of the bar of the Supreme Court of Florida on behalf of and at the instance and request of the Appellee, Broward County Port Authority, a public corporation, filed petition in said Supreme Court of Florida to

intervene in said mandamus proceedings as Amicus Curiae and also filed petition for rehearing in said cause. All of which was pending before the Supreme Court of Florida on the 8th day of November, 1937, as is shown by the certified copy of the pleadings and opinion of the Supreme Court of Florida (R. 9-37) and especially the certificate of G. T. Whitfield, Clerk of the Supreme Court of Florida (R. 36 and 37).

The Bill of Complaint was filed in the United States District Court in and for the Northern District of Florida on November 4th, 1937, more than three months after the institution of the said mandamus proceedings in the Supreme Court of the State of Florida and before a peremptory writ of mandamus had been issued.

Prior to the filing of the Bill of Complaint in the Northern District of Florida in this cause, the Appellants were defendants in the mandamus action which had been instituted in the Supreme Court of the State of Florida to compel these Appellants to enforce the provisions of said Senate Bill No. 760 and upon the filing of said Bill of Complaint in the United States District Court of the Northern District of Florida on November 4th, 1937, these Appellants were made defendants in an injunction action seeking to prevent these Appellants from enforcing the provisions of said Senate Bill No. 760. In other words upon the bringing of this action in the Federal Court these Appellants became the defendants in two causes, one a mandamus proceeding in the State Court which was and had been pending for sometime prior to November 4, 1937, to compel these Appellants to enforce the provisions of said Act and the other an injunction proceeding in the United States District Court of the Northern District of Florida

to prevent these Appellants from enforcing the provisions of the identical Act.

Section 265 of the Judicial Code (Title 28, Section 379, U.S.C.A.) was enacted for the very purpose of preventing a conflict of jurisdiction between the State and Federal Courts such as was actually created in this case, and the United States District Court in and for the Northern District of Florida was without jurisdiction to grant the injunctive relief against Appellants with this situation existing.

Certainly it can not be contended that the mandamus action in the Supreme Court of the State of Florida is not a proceeding in a court of a state; and no contention can be made that any fact exists which can bring the said mandamus action within the exception contained in said Section 265 of the Judicial Code.

This question has been before the Courts many times and it has been consistently held that the purpose of Section 265 of the Judicial Code is to preserve the dignity and protect the effectiveness of the process of Courts and to avoid unseemly conflicts between them.

American Association, Limited vs. Hurst et al, 59 Fed 1.

Thomas J. Haines et al vs. Charles Carpenter et al, 91 U.S. 254; 23 L.Ed. 345.

Dial et al vs. Reynolds et al, 96 U.S. 340, 24 L.Ed. 644.

United States vs. Parkhurts-Davis Mercantile Co., 176 U.S. 317, 44 L.Ed. 485.

Peck et al vs. Jeness, Gage and Lyons, etc, 7 How. 612, 12 L.Ed. 841.

Essanay Mfg. Co. vs. Kane 258 U. S. 358, 66 L.Ed. 658.

Hill vs. Martin 296 U.S. 393, 80 L.Ed. 293.

Richmond Hosiery Mills vs. Camp, 74 Fed. (2nd) 200.

Harrison et al vs. Triplex Gold Mines et al, 33 Fed. (2nd) 667.

Ritholz et al vs. North Carolina State Board, etc. et al, 18 F. Supp. 409.

Reisler vs. Forsyth et al, 21 F. Supp. 610.

Pughe vs. Patton et al, 21 F. Supp. 182.

While the record in this case fails to show that a peremptory writ of mandamus has been issued by the Supreme Court of Florida against these Appellants, such issuance could in no way affect the prohibition created by Section 265 of the Judicial Code.

As was stated in the case of *Hill vs. Martin*, 296 U.S. 393, 80 L.Ed. 293, the prohibition of Section 265 continues from the institution of the proceedings in the State Court until the final satisfaction of the final judgment or decree rendered in that Court. Mr. Justice Brandeis in discussing this point used the following language (text 403):

> "The prohibition of Section 265 is against a stay of 'proceedings in any Court of a state.' That term is comprehensive. It includes all steps taken or which may be taken in the State Court or by its officers from the institution to the close of the final process. It applies to Appellate as well as to original proceedings; and is independent of the doctrine of res judicata. It applies alike to action by the Court and by its ministerial officers; applies not only to an execution issued on a judgment, but

to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective."

In the case of *Reisler vs. Forsyth et al,* 21 F. Supp., 610 (Cited supra) the facts were very similar to those in the case at bar. A mandamus had been issued by the New Jersey Supreme Court when application was made to the Federal Court for an injunction, just as in the case at bar, and the Court in denying the application for injunction and holding that because of Section 265 of the Judicial Code it was without jurisdiction, used the following language (text 612):

> "By virtue of the authorities cited it seems clear that this Court under the facts in this case cannot order one not to do that which a State Court has ordered him to do. Aside from the statute hereinbefore quoted, the rule is based upon comity and is essential to the orderly administration of justice, and to prevent unseemly conflict between courts."

A mandamus proceeding in a State Court continues to pend in said Court until it is reversed or set aside by a direct proceeding in that cause.

In the case of *Pughe vs. Patton et al,* 21 F. Supp. 182 (Cited supra) the following language was used (text 185):

> "A bill in a state court that has ripened into a final decree, and permanent injunction, may never be said to have come to rest, in the sense that it may be reviewed in a Federal Court. It is a live proceeding out of which the arm of the chancellor may reach at any time. See, also, *Harrison vs. Triplex Gold Mines* (C.C.A.) 33 Fed. (2nd) 667."

A peremptory writ of mandamus may never be said to have come to rest because the arm of the Court may reach out at any time to enforce compliance with the commands of the writ.

Appellants earnestly contend that the United States District Court in and for the Northern District of Florida, was without jurisdiction to grant the injunctive relief prayed in the Bill of Complaint and this cause should be reversed.

ARGUMENT ON SECOND QUESTION

For convenience of the Court we repeat the second question:

Does a State have the power under Article 1, Section 10, Clause 2, of the Constitution of the United States to enact, through its Legislature, a statute which fixes a minimum standard of an article of commerce when used in such state, and requires the inspection of such article when imported into such State from a foreign country and lays an inspection fee thereon to pay the expenses of inspecting such imports?

Article I, Section 10, Clause 2, of the Constitution of the United States provides as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

By this provision the power to levy imposts or duties on imports or exports that may be absolutely necessary for executing inspection laws is specifically reserved in the States, and if the statute under consideration lays the inspection fees on imports for the purpose of paying the expenses of inspecting the imported article, it is clear that the Legislature of Florida acted within its reserved powers under the Constitution of the United States.

By reference to the statute, which is set out in full in Appendix A hereto, it will be readily seen that it fixes the minimum standard for all cement offered for sale, or sold, or used in the State of Florida, and makes it the duty of the State Road Department to inspect all cement imported or brought into the State of Florida from any foreign country and sold, or offered for sale, or to be used in the State of Florida, for the purpose of ascertaining if such cement complies with the minimum standard so fixed, and requires the payment to said State Road Department of an inspection fee of 15 cents on each one hundred pounds so inspected, and provides that only the monies derived and collected from such inspection fees shall be used in enforcing said statute, and by Section 7 the Act is declared to be for the purpose of securing the public safety of the people of the State of Florida.

It therefore clearly appears that said statute is an inspection law to protect the public safety and that the fees are levied for the specific purpose of paying the expenses of executing such inspection law.

The Supreme Court of the State of Florida in the case of *State of Florida ex rel. Florida Portland Cement Company, vs. Hale et al,* 129 Fla. 588, 176 Southern, 577 (R. 18-30) in passing upon this point said (text 581):

"It will be observed that this provision of the Constitution reserves in the States the right to lay imposts or duties on the imports or exports which may be absolutely necessary for executing its inspection laws. But in reserving that power in the states, it was provided in this section of the Constitution that the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the Treasury of the United States, and all such laws shall be subject to the revision and control of Congress. Therefore, if the amount levied in this act to cover the expense of inspection should exceed the costs of such inspection, the net surplus must be accounted for to the Treasury of the United States.

"It will be observed that this power reserved in the states applies only to inspection fees laid on imports and exports. It is well settled that the provisions of Clause 2, Section 10, article 1, of the Constitution of the United States applies only to articles imported from, or exported to, foreign countries. See *New Mexico ex rel. McLean vs. Denver & R.G.R. Co.*, 203 U.S. 38, 27 S.Ct. 1, 3, 51 L.Ed. 78; *Patapsco Guano Co. vs. Board of Agriculture*, 171 U.S. 345, 18 S. Ct. 862, 864, 43 L.Ed. 191; *Woodruff vs. Parham*, 8 Wall, (75 U.S.) 123, 19 L.Ed. 382; *Pittsburg & S. Coal Co. vs. Louisiana*, 156 U.S. 590, 15 S.Ct. 459, 39 L.Ed. 544." (R. 22-23) * * *

(text 583):

"In the light of the decisions, the provisions of the Constitution, and the provisions of the act under consideration, *we hold that it constitutes a valid inspection law; that the purpose of the act is for the safety and welfare of the consumer of commercial cement in the State of Florida.*"

(text 584):

"The inspection of cement imported from foreign countries was deemed by the Legislature to be necessary as a protection to dealers in Florida against

having foisted on them a commodity which can not be resold under the laws of Florida, and which, because of its inferior quality, constitutes unfair competition in this commodity." (R. 26-27).

If the inspection fees levied under the Act produce more than is necessary to pay the expenses of inspection, the net produce therefrom must be accounted for and paid over to the Treasury of the United States as provided in the Constitution; and the statute is subject to the revision and control of Congress. Therefore the Courts are not concerned with any claim of excessiveness of the inspection fee because the State can only retain out of the monies collected thereunder, sufficient to pay the actual expenses of inspection and should there be any monies left after the payment of such expenses, the State Road Department of Florida is required to pay over such balance to the Treasury of the United States. Now, the statute under consideration has never been put into operation, therefore it has never been demonstrated that the inspection fees levied therein will produce more than what is absolutely necssary to pay the costs of executing its inspection provisions. However, if, after it is put into force, it should develop that the fees laid did produce more than was absolutely necessary to cover the costs of the inspection, the State Road Department of Florida would pay over to the Treasury of the United States, all such net produce until such time as either the Legislature of the State of Florida or the Congress of the United States under the specific authority delegated by said clause of the Constitution, reduced such inspection fees. In other words the Constitution recognizes that the State might levy an inspection fee which would produce more than was absolutely necessary to pay the expenses of executing its inspection laws by providing that all net produce should be accounted for to the Treas-

ury of the United States; and by providing that such Act should be subject to be revised and controlled by Congress, specified the authority to pass upon any claim of excessiveness. When the Constitution prescribes the manner in which a thing shall be done, it prohibits the doing of such thing in a different manner from the one prescribed in the Constitution.

This provision of the Constitution and a statute similar to the one under consideration here were before the Court in the early case of *Neilson vs. Garza,* 17 Fed. case, page 1302, case No. 10,091 (2 Woods 287):

> "As the article of the constitution which prescribes the limit goes on to provide that 'all such laws shall be subject to the revision and control of congress,' it seems to me congress is the proper tribunal to decide the question, whether a charge or duty is or is not excessive. If, therefore, the fee allowed in this case by the state law is to be regarded as in effect an impost or duty on imports or exports, still if the law is really an inspection law, the duty must stand until congress shall see fit to alter it." * * * *
>
> "I do not say that such an inspection as this is necessary or expedient; but it is inspection; and at such a place as Brownville, it may, for aught I know, be a necessary police regulation to prevent frauds and clandestine removal and exportation of property belonging to the people of Texas. The fee or duty exacted may be excessive; but if so, congress can regulate that. Our only concern with the case is to know whether the acts required by the state law, and performed by the defendant on and about the hides, are fairly characterized as inspection or not. If they are, that ends the case here. We think the law is an inspection law; that the part of it in question is not foreign to that character;

and that the acts of the defendant for which the fees exacted by him were charged were fairly performed under said inspection law; and that the fees are valid charges, until they shall be altered by congress."

In the case of *Padelford, Fay and Co. vs. Mayor et al,* 14 Ga. Rep. text 516, the Court used the following language in passing upon this identical question:

> "If the purpose be to execute its inspection laws, the State may tax imports without the consent of Congress. And she may make the tax as high as she pleases; but she can retain of the 'produce' of the tax, only as much as is necessary to defray the expenses of the execution of the inspection laws. The residue she must pay to the United States. No part of the law, under which she imposes a tax for this purpose, is void. It is only subject to revision and control by Congress."

In the case *Patapsco vs. North Carolina,* 171 U.S. 345, 34 L.Ed. 193, the question under consideration in the case at bar was considered and the decision in the case of *Neilson vs. Garza,* 17 Fed. cases 1302, case No. 10,091 (2 Woods 287) cited supra, was cited and approved by this Court. Mr. Chief Justice Fuller in delivering the opinion of the Court, used the following language:

> "The clause recognized that the inspection of such article may be required by the States, and that they may lay duties on them to pay the expense of such inspection; but as it would be difficult, if not impossible, to determine the necessary amount with exactness, and to remove any inducement to excess, it was provided that any surplus should be paid to the United States. As such laws are subject to the revision and control of Congress, it has been

suggested that whether inspection charges are excessive or not might be for Congress to determine and not the courts." * * * *

"If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge." * * * *

"Inspection laws are not in themselves regulations of commerce, and while their object frequently is to improve the quality of articles produced by the labor of a country and fit them for exportation, yet they are quite as often aimed at fitting them, or determining their fitness, for domestic use, and in so doing, protecting the citizen from fraud. Necessarily, in the latter aspect, such laws are applicable to articles imported into, as well as to articles produced within, a State.

Clause two of section ten expressly allows the State to collect from imports as well as exports the amount necessary for executing its inspection laws." * * * *

"It being competent for the State to pass laws of this character, does the requirement of inspection and payment of its cost bring the act into collision with the commercial power vested in Congress? Clearly this cannot be so as to foreign commerce, for clause two of section ten of article one expressly recognizes the validity of state inspection laws, and allows the collection of the amounts necessary for their execution."

This provision of the Constitution and the power of a state to enact inspection laws and levy inspection fees thereunder, was again passed upon in the case of *McLean vs. Denver etc.*, 203 U.S. 38, 51 L.Ed. 85, and Mr. Justice Day in sustaining the state statute said (Text 49):

> "As to the objection predicated on Section ten of Article one, that section can have no application to the present case, as that provision directly applies only to articles imported or exported to foreign countries. *Patapso Guano Co. vs. North Carolina Board of Agriculture,* 171 U.S. 345, 350, and cases cited. Moreover, that paragraph of the Constitution expressly reserves the right of the States to pass inspection laws, and if this law is of that character it does not run counter to this requirement of the Constitution."

In the case of *Red "C" Oil Co. vs. North Carolina,* 222 U. S. 380, 56 L.Ed. 240, this Court carefully considered the question now before the Court and sustained an Act of North Carolina very similar to the Act now under consideration. The Court speaking through Mr. Chief Justice White (Text 393) said:

> "The contention that the tax is so excessive on its face as to conclusively evidence the unconstitutionality of the burden, if imposed as a mere inspection charge, is, we think, also without merit. Prima facie the charge must be deemed to be reasonable. *Western Union Telegraph Co. vs. New Hope,* 187 U.S. 419."

(Text 394):

> "A law cannot be declared invalid because in the opinion of the court it does not accord with sound policy. The appeal for redress in su h case must be to the law-making power."

The proposition now being considered by the Court is to be differentiated from that considered in *Voight vs. Wright,* 141 U.S. 62, and *Brimmer vs. Rebman,* 138 U.S. 78, and other cases of similar holding because they all deal with State statutes which discriminate against products of

other States. No such question is involved in the case at bar.

Mr. Chief Justice Marshall made the distinction between these questions clear in the case of *Brown vs. Maryland*, 12 Wheat. (25 U.S.) 419, 6 L.Ed. 678, and in striking down the Maryland statute involved therein calls attention to the provision of the Constitution of the United States now being considered and points out that a state may levy a tax or duty of inspection on imports or exports under this provision.

We respectfully submit that the Legislature of the State of Florida acted clearly within its power reserved under Article 1, Section 10, Clause 2, when it enacted Senate Bill No. 760 of 1937, and that said statute is a valid, binding inspection law as was held by the Supreme Court of Florida in the decision hereinabove cited, and the final decree of the United States District Court of the Northern District of Florida should be reversed.

While no mention is made in the Bill of Complaint as to any effect which said Senate Bill No. 760, laws of Florida of 1937, might have on any so-called Trade Agreement negotiated by the Secretary of State of the United States under authority delegated to the President of the United States by the so-called Trade Agreements Act, being an amendment to the Tariff Act of 1930, and designated under U.S.C.A., Title 19, as Sections 1351 and 1352 (48 Stat. 943 and 944), in view of the fact that an affidavit was filed herein by the Honorable Cordell Hull, Secretary of State of the United States, wherein it is stated that a protest has been received from the government of Belgium and that said Florida statute might materially affect the

Trade Agreement which had been negotiated between the United States and the Belgo-Luxemburg Economic Union, we desire to call the Court's attention to the fact that these Trade Agreements can in now way affect the validity of statutes enacted by States under power which is specifically reserved by the Constitution of the United States to the States.

Of course we recognize that by the Constitution of the United States, Treaties are made the Supreme Law of the Land. However, in order to be the Supreme Law of the Land a Treaty must be constitutional. An unconstitutional Treaty would not be a Supreme Law of the Land. The Constitution of the United States by Article 2, Section 2, Clause 2, provides the manner by which the President of the United States may negotiate and enter into Treaties. The provision in this regard being as follows:

> "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

Under this provision the President has the power to negotiate Treaties and after he has negotiated same, such Treaty must be submitted to the Senate and be concurred in by a vote of two thirds of the Senators present. In no other way can a Treaty become the Supreme Law of the Land. And we further submit that a Treaty, even though made strictly in accordance with the constitutional provisions in reference to such making, must be in accord with the other provisions of the Constitution in order to be constitutional and valid. In other words, the Constitution of the United States cannot be changed by a Treaty and neither can a power specifically reserved under the Constitution of the United States to the States be taken

away from the States by a Treaty. Therefore, we respectfully submit that, even a Treaty made by the President and concurred in by the Senate as provided by the Constitution of the United States, could in no way affect the power specifically reserved in the States by Article 1, Section 10, Clause 2, of the Constitution of the United States nor the validity of a State statute enacted under such reserved power. And especially is this true in view of the provision made by the Constitution of the United States that the State statute is subject to be revised and controlled by Congress. In order to revise or control this State statute by any authority except the Legislature of the State it would be necessary for both branches of the Congress to take action thereon.

What we have just said applies to Treaties negotiated and made in accordance with the provisions of the Constitution. It is not suggested here that Senate Bill No. 760, Laws of Florida of 1937, might affect any Treaty existing between the United States and any foreign country but only that it *might* affect the Trade Agreement entered into between the United States and the Belgo-Luxemburg Economic Union. These Trade Agreements have none of the distinguishing features of a Treaty. Therefore the validity of this State statute certainly can in no way be affected by any such Agreement.

CONCLUSION

We respectfully submit that the United States District Court in and for the Northern District of Florida was without jurisdiction to grant injunctive relief against Appellants because of the prohibition contained in Section 265 of the Judicial Code, being Section 379 of Title 28 U.S.C.A.; and that said Senate Bill No. 760, Laws of Flor-

ida of 1937, was enacted by the Legislature of the State of Florida under the power specifically reserved in the States by Article 1, Section 10, Clause 2, of the Constitution of the United States and is constitutional and valid in every respect.

All of which is respectfully submitted.

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H. E. CARTER,
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Attorneys for Appellants.

PAT WHITAKER
TOM WHITAKER
Of Counsel.

APPENDIX "A"

SENATE BILL NO. 760

AN ACT Providing for the Fixing of a Minimum Standard for all Cement Offered for Sale, Sold or Used in the State of Florida and to Authorize and Empower the State Road Department of the State of Florida to Write Rules and Regulations for the Effectual Enforcement of this Act; Providing for the Inspection of all Cement Imported and Brought into the State of Florida from any Foreign Country and Providing for an Inspection Fee to be Paid for the Inspection of all Cement Imported and Brought into the State of Florida from any Foreign Country and Offered for Sale, Sold, or to be Used in the State of Florida; Providing Penalties for the Violation of any of the Provisions of this Act as well as any Rule or Regulation Promulgated by the State Road Department; and Providing for the Enforcement of the Provisions of and Regulations made in Pursuance of this Act.

"WHEREAS, during the past twelve months approximately thirty per centum (30%) of all cement sold and used in Florida was manufactured in foreign countries and imported and brought into the State of Florida, and,

"WHEREAS, in view of the fact that large numbers of dwellings, apartment houses, hotels and public buildings are constructed of cement or cement forms an integral part of the construction thereof, and,

"WHEREAS, it is of paramount importance to the public safety that only cement measuring up to a minimum standard should be offered for sale, sold or used in the State of Florida, and,

"WHEREAS, much of the foreign manufactured cement imported and brought into the State of Florida has been of inferior quality, and

"WHEREAS, the importation and sale or use of foreign cement not only jeopardizes public safety but amounts to unfair competition being forced on this great industry in Florida,

"THEREFORE:"

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

SECTION 1. That the State Road Department of the State of Florida is hereby authorized and required to fix a minimum standard for all cement offered for sale or sold or used in the State of Florida; said standard to be fixed by said State Road Department shall be the standard now in force and used by it in the purchase and use of cement in the construction of public highways which said standard of cement was set up by the American Society of Testing Materials and approved by the United States Bureau of Public Roads for highway construction; and said standard is hereby fixed and designated as a minimum for all cement offered for sale or sold or used in the State of Florida and it shall be unlawful for any person, persons, association of persons, firm or corporation to sell, offer for sale or use in the State of Florida any cement in the construction of any hotel, apartment house, rooming house, dwelling or public building of any kind or character which does not measure up to the minimum standard herein fixed.

SECTION 2. It is hereby made the duty of the State Road Department to inspect all cement imported or

brought into the State of Florida from any foreign country and sold or offered for sale or to be used in the State of Florida, and no cement imported and brought into the State of Florida from any foreign country shall be sold, offered for sale or used in the State of Florida until the same has first been inspected by the State Road Department and a tag or other evidence showing such inspection shall be affixed to said cement, or the container thereof, showing that it has been so inspected or approved; and it shall be unlawful for any person, firm, association of persons, or corporation to sell, offer for sale or use in the State of Florida any cement imported or brought into the State of Florida from any foreign country before such inspection has been made by the State Road Department and such cement approved as herein set out and until there has been paid an inspection fee to the State Road Department of fifteen cents (15c) on each one hundred pounds or fraction thereof; said fee so required to be paid for inspection of cement manufactured in a foreign country and imported and brought into the State of Florida shall be paid to the State Road Department and said inspection fee is required to be paid as inspection fees on cement imported and brought from foreign countries into the State of Florida.

SECTION 3. The State Road Department is hereby authorized to employ all field and other agents and clerical assistance at such times and periods as may enable it to enforce the provisions of this Act, and is hereby authorized to fix their compensation and said State Road Department is hereby authorized to purchase and install such facilities from time to time as it may deem necessary to make fully effectual the provisions of this Act. The State Road Department shall use and expend in enforcing this Act only

monies derived and collected hereunder.

SECTION 4. Said State Road Department is hereby authorized and empowered to promulgate any and all reasonable rules and regulations that it may deem necessary and proper for the proper administration and enforcement of this Act and said rules and regulations shall have the force and effect of law.

SECTION 5. It shall be unlawful for any person to obstruct or resist any authorized agent or inspector designated by the State Road Department while such person is in the performance or discharge of any duty imposed upon, authorized or required under the provisions of this Act, or by any rule or regulation adopted as provided hereunder.

SECTION 6. Any person who shall violate any of the provisions of this Act or shall do or commit any act herein declared to be unlawful or violate any rule or regulation made or promulgated by the State Road Department by virtue of the authority herein, shall be punished by a fine of not more than $2500.00, or imprisonment in the county jail for not more than 12 months, or both in the discretion of the court.

SECTION 7. This law shall be construed as an Act intending to secure public safety of the people of the State of Florida.

SECTION 8. The State Road Department is hereby authorized to designate and utilize the services of the several officers and inspectors of the Health Department, Hotel Commission of the State of Florida, as well as any and all other duly authorized and legally constituted offi-

cials who are vested with police power, in order to enforce and carry out the provisions of this Act in all particulars, and it shall be the duty of all such inspectors and other officials to comply with the orders and requests of said Road Department in connection with the enforcement of this Act, without any additional compensation than that already being paid such inspector or officials, and refusal so to do on the part of any inspector or official shall constitute legal and sufficient grounds for removal from office.

SECTION 9. In addition to other remedies provided for in this Act, the State Road Department is hereby authorized to proceed in any of the courts of this State by injunction to restrain any threatened continued violation of this Act, and it shall be the duty of each State Attorney, County Prosecuting Attorney, and of the Attorney General, to assist in the enforcement of the provisions of this Act upon the request of the State Road Department.

SECTION 10. All laws and parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed.

SECTION 11. This Act shall take effect upon its becoming a law.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 418

A. B. HALE, AS CHAIRMAN, AND E. A. McCOLSKEY ET AL., ETC.,

Appellants,

vs.

BIMCO TRADING, INC., AND BROWARD COUNTY PORT AUTHORITY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

MARTIN H. LONG,
R. R. SAUNDERS,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 418

A. B. HALE, AS CHAIRMAN, AND E. A. McCOLSKEY ET AL., ETC.,

Appellants,

vs.

BIMCO TRADING, INC., AND BROWARD COUNTY PORT AUTHORITY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

STATEMENT MAKING AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Now come the plaintiffs (appellees), by their undersigned attorneys, and, in accordance with the provisions of Paragraph 3, Rule 12, of the Rules of the Supreme Court of the United States, submit the following statement disclosing matter and grounds making against the jurisdiction of the Supreme Court of the United States to review, upon ap-

peal, the final decree entered in this cause on the 14th day of June, A. D. 1938, and moves the Court to dismiss this appeal on the grounds hereinafter stated and upon other grounds; and the plaintiffs (appellees) also move the Court to affirm the orders and decrees of the District Court herein upon the grounds hereinafter stated and other grounds:

(a) A mandamus action was brought against the defendants (appellants) in the Supreme Court of Florida to compel the enforcement of that certain Act of the Legislature of the State of Florida, known as Senate Bill No. 760 of 1937, which Act is set out in full in the defendants' (appellants') "Jurisdictional Statement", and the said Supreme Court, on October 12, 1937, overruled a demurrer to and motion to quash the alternative writ, allowing the respondents (appellants) ten days within which to file an answer or return, in default of which, a peremptory writ would issue, the opinion of said Supreme Court being reported in the case of *State ex rel, Florida Portland Cement Co.* v. *Hale et al.*, 176 So. 577. The respondents (appellants) failed to file an answer or return within the ten days allowed, thereby becoming in default, and then announced, or caused to be announced, through the public press, that they would forthwith undertake the enforcement of the said Act. Thereafter, on November 4, 1937, plaintiff, Bimco Trading, Inc., filed its bill of complaint in the United States District Court in and for the Northern District of Florida, seeking to enjoin the defendants (appellants) from enforcing the said Act. The defendants (appellants), on November 24, 1937, filed a motion to dismiss the said bill of complaint.

On the 19th day of November, A. D. 1937, the Supreme Court of Florida issued a peremptory writ of mandamus

in the case of *State ex rel. Florida Portland Cement Co.* v. *Hale et al.*, above referred to. Several days thereafter, on the 26th day of November, A. D. 1937, a three-judge statutory court convoked under Section 266 of the Judicial Code, being Section 380, Title 28, U. S. C. A., upon a hearing, granted an interlocutory injunction, as prayed in the above mentioned bill of complaint, temporarily enjoining and restraining the defendants (appellants) from enforcing the said Act, in certain respects.

After the granting of the interlocutory injunction as aforesaid, the defendants (appellants), did not take an appeal from the order granting the said injunction, direct to the Supreme Court of the United States as permitted by Section 266 of the Judicial Code, being Section 380, Title 28, U. S. C. A., but pressed to a hearing and disposition before the same three-judge court, their aforementioned motion to dismiss plaintiffs' (appellees') bill of complaint. This said motion to dismiss was heard by the court on March 3rd, 1938, and on the same day, the court entered an order overruling and denying said motion, and allowing defendants (appellants) thirty days within which to answer. The defendants (appellants) failed to file an answer or any other pleadings and thereby admitted the allegations of the bill of complaint and accordingly, on June 14th, 1938, a default and final decree was entered, from which defendants (appellants) now take this appeal:

(b) The enforcement of the said Act would violate certain treaties and trade agreements entered into between the United States and certain foreign countries, all as appears from the affidavits of the Honorable Cordell Hull, Secretary of State, filed in this cause.

(c) The only real questions involved in this appeal have been previously decided by the Supreme Court of the United States in the following cases:

D. E. Foote & Co. v. *Stanley*, 232 U. S. 494, 58 L. Ed. 698;

Voight v. *Wright*, 141 U. S. 62, 35 L. Ed. 638;

Brimmer v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862;

Lawrence v. *St. Louis-San Francisco Railway Co.*, 274 U. S. 588, 591, 71 L. Ed. 1219, 1222;

Arkansas Railroad Commission v. *Chicago, Rock Island & Pacific Railroad Co.*, 274 U. S. 597, 598, 71 L. Ed. 1224, 1226;

Virginia Railway Co. v. *United States*, 272 U. S. 658, 71 L. Ed. 463.

These decisions are all contrary to the contentions made in this appeal by the defendants (appellants) and completely justify a dismissal of this appeal or an affirmance of the orders and decrees of the District Court.

Respectfully submitted,

MARTIN H. LONG,
Attorney for Bimco Trading, Inc.
R. R. SAUNDERS,
Attorney for Broward County Port Authority.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 42

A. B. HALE, as Chairman and E. A. McCOLLISTER, et al., etc.,

Appellants,

vs.

BIMCO TRADING, INC., and BROWARD COUNTY PORT AUTHORITY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF FLORIDA

BRIEF ON BEHALF OF APPELLEES

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IN THE
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No. 418

A. B. HALE, as Chairman, and E. A. McCOLSKEY, et al. etc., *Appellants,*

vs.

BIMCO TRADING, INC., and BROWARD COUNTY PORT AUTHORITY, *Appellees.*

BRIEF OF APPELLEES

STATEMENT OF FACTS

Bimco Trading, Inc., the original plaintiff, a New York corporation, is an importer of cement manufactured in Denmark and Belgium. (R-1) The intervening plaintiff, Broward County Port Authority is the governing body of Port Everglades, a deep water harbor located on the southeast coast of Florida. (R-55) One of its chief sources of revenue is the cement importations from the Scandinavian and other European countries. Between the time of the passage of the Legislative Act complained of in this case, and the time of the injunction by the court below, Port Everglades lost practically all of the freight business from Europe, not only the cement business but other business as well. Consequently the Act seriously affected the financial condition of the Port. The Act of the Legislature, which is attacked herein, requires that cement imported from foreign

countries, be inspected before it can be sold or used i
the State of Florida. Cement from other states is no
subject to any inspection. The cost of inspection is $3.0
per ton. The record shows that the cost of inspection here
tofore has been from $12.50 to $15.00 per shipload. On
cargo of 3,000 tons the cost of inspection would not nor
mally exceed $15.00; (R-3) under the terms of the Act, i
would be $9,000.00, which is six hundred times the norma
cost. The record shows that on a shipment already a
Miami at the time the injunction was granted, the cost o
inspection was $7,300.00 (R-43). The original bill of com
plaint alleged that this cement was of a high grade an
character, but sold for a price less than any manufacture
in the State of Florida, and consequently was attractive t
purchasers (R-2) and that the purpose of the Act was no
to protect the citizens of the State of Florida against in
ferior cements, but to benefit the Florida Portland Cemen
Company (R-3) which manufactured cement at Tampa
Florida, and was the only concern which so manufactured
cement in the State of Florida (R-3). The bill furthe
alleged that the plaintiff had contracts with citizens of th
State of Florida, for the sale of cement, (R-4) and that th
tax was so excessive and oppressive that the plaintiff coul
not afford to import the cement or pay the cost of such in
spection, and that it would lose its contracts and the profit
that it might thereby make (R-4). The plaintiff claimed
that the Florida Act was unconstitutional in the followin
respects:

(a) That it levied a tax on commerce between the United
States and foreign countries and constituted, as such,
direct burden on such commerce in violation of Article 1
Section 8, of the Constitution of the United States o
America. (R-4)

(b) That it likewise prohibited the importation into th
State of Florida of a legitimate article of commerce, also i

violation of Article 1, Section 8, of the Constitution of the United States of America (R-4).

(c) That it denied to the plaintiff and others similarly situated, the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States of America (R-4).

(d) That it levied an impost or duty under the misnomer of an inspection law in direct violation of Article 1, Section 10, of the Constitution of the United States of America (R-5).

(e) That it likewise infringed on the right of contract guaranteed by the Fourteenth Amendment to the Constitution of the United States and was in violation thereof (R-5).

The bill alleged that the defendants announced that they proposed to immediately enforce the Act and were about to appoint inspectors for that purpose (R-5), and that the enforcement of the Act would cause plaintiff irreparable injury. By an amendment to the bill it was alleged that the amount involved exceeded three thousand dollars (R-65) exclusive of interest and costs, and it likewise appeared that the original plaintiff and defendant were citizens of different states (R-1).

ARGUMENT

THE ACT IS CLEARLY UNCONSTITUTIONAL AND THE LOWER COURT RIGHTFULLY ENJOINED THE APPELLANTS.

It will be borne in mind that the Act does not require or even provide for the inspection of cement that is produced in Florida or in any of her sister states. Inspection is required only of cement "imported and brought into the State of Florida from any foreign country." The inspection fee must be paid only on cement imported and brought into the State of Florida from a foreign country.

Whether there shall be inspection or not and whether the sellers shall compensate the inspector or not, is made to depend entirely upon the place from which the cement is imported and brought into the State; that is, whether or not it is imported or brought in from a foreign country. If cement manufactured in Florida were shipped abroad, it could not be brought back without inspection.

In adopting the Act, the Legislature purported to do so under the guise of enacting an inspection law. It is apparent, however, that the purpose of the Act was not to inform the buyers and users of cement of the quality or kind of cement with which they were dealing, for no inspection whatever is required or provided for except with respect to cement imported from a foreign country. The purpose of the Act, therefore, is not the protection of the public against inferior cement. In the preamble to the Act, the Legislature finds that only 30% of the cement offered for sale and used in Florida is imported from a foreign country. Manifestly, if it is necessary for the protection of the people of the state that cement sold or used in the state be inspected and required to conform to the prescribed standard, such protection could only be given by inspecting the 70% of the domestic manufactured, as well as the 30% of the foreign-manufactured cement.

It does not require further argument to demonstrate that although avowedly enacted to protect the people of the state against inferior cement, the Act has no real or substantial relation to such an object, but only by its necessary operation is a regulation of commerce beyond the power of the state to establish. The exorbitantly high "inspection fee" of 15c on each 100 pounds or fraction thereof, although imposed in the name of compensation for the inspection, is in reality an onerous tax.

> "If a statute purporting to have been enacted to protect the public health, the public morals or the public

safety, has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205 at 210.

"In whatever language a statute may be framed its purpose must be determined by its natural and reasonable effect."

Minnesota v. Barber, 136 U. S. 313, 34 L. Ed. 455.

Henderson v. New York, 92 U. S. 259, 23 L. Ed. 543.

The natural and reasonable effect of the present Act is to prohibit commerce in foreign-manufactured cement, and that must be considered its purpose.

That it is unconstitutional to require inspection from one place and not from another has been determined by this Court in many cases.

See *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678.

Brimmer v. Rebman, 138 U. S. 78, 34 L. Ed. 862.

Voight v. Wright, 141 U. S. 62, 35 L. Ed. 638.

Foote v. Stanley, 232 U. S. 494, 58 L. Ed. 690.

In the Voight case, supra, the Court had before it the question of the validity of a statute of Virginia, which provided that all flour brought into the state and offered for sale therein, should be inspected, and required the payment of a fee for such inspection. Flour made and sold in the state was not required to be inspected.

In the case of *Brimmer v. Rebman,* supra, there was a statute of Virginia which required that all meat slaughtered more than 100 miles from the place at which it was offered for sale, be first inspected and required a fee to be paid for such inspection.

The Court in holding that statute void as a burden on commerce, further said:

> "The statute is, in effect, a prohibition upon the sale in Virginia, of beef, veal o mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats cannot sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, he cannot compete upon equal terms, in the markets of that commonwealth, with those in the same business, whose meats, or like kind, from animals slaughtered within less than one hundred miles from the place of sale, are not subjected to inspection at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, is thus *made to depend entirely upon the place where the animals from which the beef, veal or mutton is taken, were slaughtered.*" (Italics ours).

Here, it is the place from which the cement is imported which the statute condemns. The four last cited cases seem to us to answer completely all the arguments that appellants have made or can make with reference to the validity of the tax and the Act involved herein.

The obvious purpose and effect of the Act, is to prevent cement imported from a foreign country from coming into competition with domestic cement, by levying a tariff on imported cement. It is not competent for any state to set up a tariff wall for the protection of the local industry. That function belongs solely to Congress.

The case of *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015, involved a statute of Pennsylvania which discriminated against imports from a foreign country. In holding the statute invalid, the Court relied upon its earlier decisions where state statutes discriminating against commerce between the states had been held invalid; and in declaring that *a rule applicable to commerce between the states was equally applicable to commerce with foreign nations, said:*

> "The Congress of the United States is granted the power to regulate commerce with foreign nations in precisely the same language as it is that among the states. If a tax assessed by a state injuriously discriminating against the product of a state of the Union is forbidden by the Constitution, a similar tax against the goods imported from a foreign state is equally forbidden."

Under the rule established in the cases, supra, the Act is plainly in contravention of the commerce clause of the Federal Constitution.

There are many uses for cement where a cement of a lower standard than that fixed in the Act may be very properly used, and there is no legitimate basis for entirely excluding from commerce such cement. Certainly, the safety of the public does not require that a person who wishes to lay a concrete walk in his private flower garden, should be prohibited from using a cement not of the approved standard for highway construction. Nevertheless, no cement from a foreign country may be even used in Florida under the terms of this Act.

We are not here dealing with an article of food unfit for human consumption, but with a lawful subject of commerce.

It is well settled that a state cannot prevent the importation of lawful subjects of commerce.

Austin v. Tennessee, 179 U. S. 243, 45 L. Ed. 224.

Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. Ed. 49.

Lyng v. Michigan, 135 U. S. 161, 34 L. Ed. 128.

Leisy v. Hardin, 135 U. S. 100, 34 L. Ed. 128.

Nor has the state the power to prevent the sale of a legitimate article of commerce.

Collins v. New Hampshire, 171 U. S. 30, 43 L. Ed. 60.

Leisy v. Hardin, supra.

It should be noted also that Section 2 of the Act makes it unlawful to sell, offer for sale or use any cement of a standard below that fixed in the Act, if such cement is imported or brought into the State from any foreign country. Yet, with the exception of use in a limited class of buildings specified in Section 1 of the Act, it is not unlawful to sell, offer for sale or use cement below the fixed standard, if it is of domestic manufacture.

The Patapasco case, upon which appellants rely so strongly, provided for the inspection of all fertilizers with a uniform fee for such inspection of all kinds whether foreign or domestic, or from other states. In other words, an equal and impartial inspection wholly unlike the Florida law.

It is thus apparent that cement of a grade below the fixed standard was not considered by the Legislature to be an unfit article of commerce. The prohibition against the importation, therefore, was not laid because of the quality of the cement, but solely in order to preclude competition.

It is submitted that the Act violates the provisions of the United States Constitution as alleged in the bill of complaint and that the lower court rightfully enjoined its enenforcement.

SAID ACT ALSO VIOLATES THE RECIPROCAL TRADE AGREEMENT CONVENTION OR TREATY ENTERED INTO AND NOW EXISTING BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND BELGIUM.

The Florida law in question discriminates against cement imported from foreign countries and hence is a burden on foreign commerce and the so-called inspection fee is so excessive and unreasonable as to constitute an undue and unconstitutional burden on foreign commerce even though it did not violate reciprocal trade agreements between the United States of America and foreign countries at this time, but it emphatically does violate now existing trade treaties, as clearly appears from the affidavit of Secretary of State, Hon. Cordell Hull (R-47-54). This matter is most important when considered in the light of this existing reciprocal trade agreement and in the light of foreign commercial relations between the United States and other countries, and particularly in relation to the trade agreement between the United States and the Belgo-Luxemburg Economic Union, signed February 27, 1935. In this trade agreement, which was concluded by the President of the United States under the authority of the so-called Trade Agreements Act of 1930, the United States granted a reduction of one and one-half cents a hundred pounds in the customs duty applicable to Roman, Portland and other hydraulic cement or cement clinker of Belgium or Luxemburg origin. In return for this and other concessions and assurances granted by the United States, the Belgo-Luxemburg Economic Union granted important customs advantages to products of the United States imported into Belgium and Luxemburg. Under the provisions of the Trade Agreements Act, the rates of duty and other import restrictions proclaimed by the President under the authority of the Act in connection with trade

agreements are extended to articles, growth, produce or manufacture of all countries which have not been found by the President to discriminate against the commerce of the United States. The rate of duty of four and one-half cents a hundred pounds applicable to hydraulic cement, which was proclaimed by the President on April 1, 1936, pursuant to the trade agreement with the Belgo-Luxemburg Economic Union, is, therefore, the effective rate of duty applicable to cement imported from all non-discriminating countries. At the present time this rate is applicable to cement imported from all countries except Germany and Australia.

The inspection fee provided for in the Act of June 5, 1937, of the Legislature of the State of Florida amounts to fifteen cents a hundred pounds, or three and one-third times the customs duty levied by the Federal Government on hydraulic cement imported from Belgium and other non-discriminating countries. Florida is an important market for imported cement and during the year 1936, 132,039 pounds of hydraulic cement, or twenty-one per cent of the total imports into the United States, were entered in the Florida customs district. Of this cement, approximately seventy per cent was of Belgium origin. It seems probable that this large fee, which is levied only on cement imported from foreign countries and not on cement produced in Florida and other states of the Union, will effectually prevent the importation of foreign cement into Florida and consequently will impose a serious discriminatory burden upon the foreign commerce of the United States, and in view of the importance of Florida as a market for imported cement, the inspection fee will undoubtedly nullify largely the concession granted in the trade agreement. Indeed, the Belgian Government has protested to the Department of State against the Florida inspection fee, which it states, is contrary to the trade agreements and cannot fail to be a

heavy burden on trade between Belgium and the United States.

The case of *Missouri v. Holland*, a United States Supreme Court decision, reported in 252 U. S. 416, 64 L. Ed. 641, provides as follows:

> "* * * The Constitution (of the United States) as ratified by the people, made the supreme law of the land to consist of three things: 1st the Constitution; 2nd, the laws of the United States which shall be made in pursuance thereof; 3rd, all treaties made or which shall be made under the authority of the United States. . . . The powers reserved to the states respectively "or to the people are, under this Constitution as sacred as the power to make treaties. . . .
>
> "The power of the Federal Government to make and enforce treaties is not a limitation on the reserved powers of the states, but is the exercise of a power not reserved to the states under the 10th Amendment, being both expressly granted to the United States and prohibited to the states. . . .
>
> "The treaty-making power of the United States embraces all such power as would have belonged to the several states if the Constitution had not been adopted; in the exercise of that power the Federal Government is accredited agent of both the people of the United States and the states themselves. Baldwin v. Franks, 120 U. S. 678, 682, 683, 30 L. Ed. 766-768, 7 Sup. Ct. Rep. 656, 763.
>
> "The treaty-making power applies to all matters which may properly be the subject of negotiations between the two governments."

The reciprocal trade agreement which we have set forth in this brief does not contravene any prohibitory words to be found in the Constitution. In this case a question of national interest of very nearly the first magnitude is involved. The Belgian Government, one of the signers of the

treaty involved herein, has already protested to the State Department of the Government of the United States on account of the cement bill passed by the Florida Legislature in 1937.

It must be noticed that our scheme of government contemplates the delegation of certain and defined powers to national control and the reservation of equally certain powers to state or local control. Although there is with respect to the existence and location of those powers no conflict between state and Federal Sovereignties, yet, in a complicated system such as ours, wherein exist two governments over the same people, in which in different ways the laws first of one and then of the other are supreme according to the authority under which they are enacted and with reference to the subjects to which they are addressed, conflicts in the exercise of those powers are inevitable.

The Supreme Court at an early date laid down a broad formula which from that time has been the general principle governing the possibility of state exercise of power. The Court held that the states may exercise concurrent or independent power in all cases except three: (1) Where the power is lodged exclusively in the Federal Constitution; (2) where it is given to the United States and prohibited to the states; (3) where, from the nature and subjects of the power, it must necessarily be exercised by the National Government.

Volume II of "American Jurisprudence," on pages 874 and 875, holds as follows:

> "The power of Congress is exclusive whenever a state enactment would clearly be repugnant to the exercise of authority by the United States Government or whenever the subject matter is national in character so as to require uniformity of regulation affecting all the states alike. . . .
>
> "In order to determine whether a statute is a just

> exercise of the state power or is intended by roundabout means to invade the domain of Federal authority, the courts will look into its operation and effect in order to determine its true purposes."

citing *Campagnie Francaise de nav. a Vapeur v. State Board of Health,* 186 U. S. 380, 46 L. Ed. 1209.

Counsel for appellants apparently contend that this Belgian treaty or trade-agreement is unconstitutional, though the basis of unconstitutionality is not apparent to us. Clearly the Florida Act interferes with this trade-agreement and where there is such conflict we contend that the trade-agreement should be given effect and the Fla. Act held to be unconstitutional for the reasons stated hereinabove.

THE LOWER COURT HAD JURISDICTION TO HEAR AND TO DETERMINE THIS CAUSE.

Appellants contend that Section 265 of the Judicial Code, (Sec. 379, U. S. C. A.) deprived the lower court of jurisdiction to enter any order in this cause. It is submitted that that statute is not jurisdictional; that it neither gives nor takes away any jurisdiction from the Federal Courts; that it merely protects the courts where the comity which ordinarily obtains prohibits the United States Court from making an order in the case until a similar case between the same or substantially the same parties has been determined in the state court. The question as to what constitutes a determination in the state court so that the case may no longer be regarded as "pending" therein, is not so easy to answer. It is submitted, however, that when a final order has been entered in the state court, the case ceases to be pending within the meaning of the statute, and that thereafter an injunction may be granted. The original record of the case in the Supreme Court of Florida did not disclose that thereafter a peremptory writ of mandamus had been

issued and the petitions for intervention denied, before the injunction was granted. The statute lays no prohibition on the *beginning* of a suit in the United States Court before termination of a suit in the state court, but merely states that an injunction shall not be granted to stay proceedings in any state court. No effort is made to stay proceedings in the state court by this proceeding, other than the fact that the state officers are enjoined from enforcing the provisions of the writ of mandamus and in a technical sense the writ of mandamus is a continuing writ and there never could be any time when proceedings could be stayed so that all any state would have to do to destroy the complete effect of the Constitution of the United States, would be to have the Legislature pass an unconstituitonal act; have the courts issue a peremptory writ of mandamus ordering its enforcement and thereafter the citizens of that state will be forever deprived of the rights granted them under the Constitution of the United States. Such, of course, is not the intent of the statute.

This Court in the cases of *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165, 54 L. Ed. 430, and *Smith v. Apple*, 264 U. S. 274, at 278-279-280, 68 L. Ed. 678, disposed of the question of jurisdiction in language far superior to any that we can insert in this brief, and we submit that these decisions conclusively dispose of the attempt to invoke the aid of this statute to reverse the decision of the lower court.

We have filed a motion for leave to supplement the record of the proceedings in the Supreme Court of Florida by adding thereto the proceedings therein which took place after the date (November 9th, 1937) when the record of that case up to that time, was filed. At the time this is being written we do not know whether or not that motion will be granted. If it is not, we rely on the argument and cases cited herein to sustain the decree of the lower court. If it is, the Court

will observe that the petitions for leave to intervene pending on November 9th, 1937, were denied and a peremptory writ issued all before the lower court granted the temporary injunction. That supplement will also show that these appellants *after* the injunction order hearing, moved the Court to stay all proceedings therein until *this Court* had passed on the constitutionality of the Act herein involved, and the Supreme Court of Florida entered its order granting said motion and so staying said cause. This, we think, if not an express, was at least an implied consent that this Court should determine this cause.

Besides, as we understand it, it has always been the law that the threatened enforcement, either by criminal or civil proceedings, of an Act which violates the Constitution or a statute of the United States, may be enjoined by the Federal Court, whether or not a suit be pending in the state court with reference to that Act.

See *Rast v. Van Deeman & Lewis Co.*, 240 U. S. 342, 60 L. Ed. 679.

Ex Parte Younge, 209 U. S. 123, 52 L. Ed. 714.

Wells Fargo & Co. v. Taylor, 254 U. S. 175, 65 L. Ed. 205.

Sovereign Camp, Woodmen of the World v. O'Neill, 266 U. S. 292, 69 L. Ed. 293.

Everglades Drainage Dist. v. Fla. Ranch & Dairy Co., C. C. A. 5th, 77 Fed. (2nd) 914.

Bank of Kentucky v. Stone, 88 Fed. 383, Affd. 174 U. S. 799, 43 L. Ed. 1187.

In *Chase National Bank v. City of Norwalk*, 291 U. S. 431, 79 L. Ed. 894, the State of Ohio brought action against the Power Company for a writ of quo warranto against

the Power Company to oust it against the use of the streets, alleys, etc. That Court held that the franchise had expired, entered a judgment of ouster, and that judgment was affirmed by the Supreme Court of the State of Ohio. The action had been instituted at the request and with the aid of the city, but it was not a party thereto. Chase National Bank held the bonds which the Power Company had issued. Chase National Bank brought a suit against the city in the United States District Court, and that Court granted an injunction. The Circuit Court of Appeals reversed the injunction for various reasons, one being that it was without the prohibitions of Section 265 of the Judicial Code. The Supreme Court of the United States reversed the Circuit Court of Appeals and held that the injunction was properly granted.

We submit, therefore, that the lower court had jurisdiction of the cause; that it acted within its rights in issuing a temporary injunction and later making the injunction permanent by final decree; that the Act in question is unconstitutional and invalid and infringes upon the Constitution of the United States in the respects above set forth and that the decree of the lower court was correct and should be affirmed.

MARTIN H. LONG,
Solicitor for Bimco Trading, Inc.

R. R. SAUNDERS,
Solicitor for Broward County Port Authority.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 418

A. B. HALE, AS CHAIRMAN, AND E. A. McCOLSKEY ET AL., ETC.,

Appellants,

vs.

BIMCO TRADING, INC., AND BROWARD COUNTY PORT AUTHORITY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

MOTION FOR LEAVE TO SUPPLEMENT RECORD AND SUPPLEMENTAL RECORD.

MARTIN H. LONG,
Counsel for Appellee Bimco Trading, Inc.
R. S. SAUNDERS,
Counsel for Appellee Broward County Port Authority.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 418

A. B. HALE, AS CHAIRMAN, AND E. A. McCOLSKEY ET AL., ETC.,

Appellants,

vs.

BIMCO TRADING, INC., AND BROWARD COUNTY PORT AUTHORITY.

Appellees,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

MOTION FOR LEAVE TO SUPPLEMENT RECORD.

Come now the appellees in the above entitled cause and move the court for leave to supplement the record herein by adding thereto certified copies of certain proceedings in the Supreme Court of the State of Florida, in the case of *State ex rel., Florida Portland Cement Company* v. *A. B. Hale et al.*, to-wit:

1. Orders denying petitions of R. R. Saunders and Dwight Rogers as Counsel for Broward County Port Authority, of Philip D. Beall as Counsel for Pensacola Chamber of Com-

merce, and of Willard Utley as Counsel for Port of Palm Beach District for leave to file a petition for rehearing and to appear as *amici curiæ* in the above styled cause.

2. Petition of Willard Utley for leave to file petition for rehearing and to appear as *amici curiæ*.

3. Petition of the respondents for a rehearing filed November 1, 1937.

4. Præcipe for withdrawal of respondents' petition for rehearing.

5. Order allowing such withdrawal of petition for rehearing.

6. Peremptory writ of mandamus issued in the cause.

7. Motion for stay order filed in said cause December 2, 1937.

8. Order granting said motion for stay order.

Certified copies of said papers under the hand and seal of the Clerk and the Chief Justice of the Supreme Court of Florida have been filed in this Court. The original return herein, on pages 36 and 37 shows that certain matters were undisposed of at the time that portion of the record was filed in the lower court, which was on the 9th day of November, 1937. The order denying the petition for leave to appear as *amicus curiæ* and the order granting the withdrawal of the petition for rehearing filed by the respondents herein, was made on the 12th day of November, 1937. The peremptory writ of mandamus was issued November 19, 1937, and the motion to stay the order until this Court should decide the constitutionality of this Act, was filed on the 2nd day of December, 1937, and on the 9th day of December, 1937, an order was entered staying all proceedings under the peremptory writ until final decision of the Supreme Court

of the United States upon the constitutionality of the Act involved in this case, and until further order of the court.

WHEREFORE APPELLEES MOVE THE COURT for leave to file this motion and for printing those additions to the record in the Supreme Court of Florida.

MARTIN H. LONG,
Solicitor for Bimco Trading, Inc.
R. R. SAUNDERS,
Solicitor for Broward Co. Port Authority.

UNITED STATES OF AMERICA,
State of Florida,
County of Duval:

Martin H. Long being first duly sworn, deposes and says that he dictated the foregoing motion; that he has read the same; that he knows the contents thereof, and that the matters and things therein alleged are true.

MARTIN H. LONG.

Subscribed and sworn to before me this 9th day of January, A. D. 1939.

CLAIRE McCORMICK,
[SEAL.] *Notary Public, State of Florida at large.*

My commission expires Aug. 21, 1942.

IN SUPREME COURT OF FLORIDA.

JUNE TERM, A. D. 1938.

ORIGINAL JURISDICTION MANDAMUS.

STATE OF FLORIDA *ex rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator*,

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents*.

CLERK'S CERTIFICATE.

I, G. T. Whitfield, Clerk of the Supreme Court of Florida, do hereby certify that the papers attached hereto consisting of

1. Orders denying petitions of R. R. Saunders and Dwight Rogers as Counsel for Broward County Port Authority, of Philip D. Beall as Counsel for Pensacola Chamber of Commerce and of Willard Utley as Counsel for Port of Palm Beach District for leave to file a Petition for Rehearing and to appear as *amici curiæ* in the above styled cause.

2. Petition of Willard Utley for leave to file Petition for Rehearing and to appear as *amici curiæ*.

3. Petition of the Respondents for a rehearing filed November 1, 1937.

4. Præcipe for withdrawal of Respondents' Petition for Rehearing.

5. Order allowing such withdrawal of Petition for Rehearing.

6. Peremptory Writ of Mandamus issued in the cause.

7. Motion for Stay Order filed in said cause December 2, 1937.

8. Order granting said Motion for Stay Order.

together with the papers appearing on pages 17 and 35, both inclusive, of the record of the Supreme Court of the United States, October Term, 1938, No. 418, wherein A. B. Hale, as Chairman, and E. A. McColskey *et al.*, etc., are appellants, and Bimco Trading, Inc., and Broward County Port Authority, are appellees, constitute the complete and entire record of the said cause lately pending in the Supreme Court of the State of Florida.

And I do further certify that the papers hereto attached are the true and correct copies of the originals, as the same are on file in my said office as Clerk of the Supreme Court of the State of Florida.

Witness my hand as Clerk, and the seal of the Supreme Court of the State of Florida at Tallahassee, Florida, on this 4th day of January, A. D., 1939.

G. T. WHITFIELD,
[SEAL.] *Clerk of the Supreme Court of Florida.*

IN THE SUPREME COURT OF FLORIDA.

JUNE TERM, A. D. 1937.

Friday, November 12, A. D. 1937.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator*,

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents*.

ORIGINAL JURISDICTION MANDAMUS.

Counsel for Respondents having filed a petition for rehearing in this cause, but having thereafter filed a Request for Leave to Withdraw the said Petition for Rehearing, it is ordered by the Court that Respondents be and they are hereby allowed to withdraw the said Petition in this cause.

And Counsel for the Chamber of Commerce of Pensacola, Florida, having asked the Court by petition for leave to appear as amicus in this cause and having in said petition submitted grounds upon which it is contended that a Rehearing should be granted, which Petition has been duly considered, it is thereupon ordered and adjudged by the Court that the said Petition of the Chamber of Commerce of Pensacola be and it is hereby denied.

And Counsel for the Broward County Port Authority having filed a similar petition for leave to appear as amicus and seeking a Rehearing in this cause and this Petition having been duly considered, it is ordered and adjudged by the Court that the said Petition for Rehearing be and it is hereby denied.

A true copy. Test:

____ ____,
Clerk Supreme Court of Florida.

IN THE SUPREME COURT OF THE STATE OF FLORIDA.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator,*

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents.*

To the Honorable Justices of the Supreme Court of the State of Florida:

Comes now Willard Utley, a member of the Bar of this Court, on behalf of and in the instance and request of the Port of Palm Beach District, in Palm Beach County, a public corporation of the State of Florida, and respectfully prays the Court for permission to file a Petition for a rehearing in said cause to appear as amicus curiae in the above

entitled cause, a petition for rehearing having heretofore been filed by the Respondents herein by delivering the same to the Judges of this Honorable Court, and shows to the Court as follows, to-wit:

1. That the Port of Palm Beach District is a public corporation created by an Act of the Legislature of the State of Florida, is pecuniarily and economically interested in the outcome of this legislation and the question raised by the pleadings in said cause.

That manifest and manifold discriminations will result to the Port of Palm Beach District and to the merchants and tax payers of the Port of Palm Beach District by the imposition of the tax designated as an inspection fee and will also affect the contractors and the builders in said District by increasing the purchase price of cement by at least Three ($3.00) Dollars a ton and shall otherwise be a detriment to the citizens and businesses of said community and said Port District.

Your Petitioner further shows that heretofore the Court has rendered a decision in this cause but your Petitioner, as amicus curiae and as representing the interests of the Port of Palm Beach District and the tax payers in said District respectfully shows to the Court in the judgment rendered it over-looked or failed to consider pertinent and vital matters in harmony with the position taken by the Respondents in their brief and their argument before your Honorable Court.

2. In holding that said Act does not violate the Commerce Clause of the Federal Constitution (Article 1, Sec. 8), this Court overlooked and failed to consider that this Act does not require any inspection of or levy any inspection fee upon any cement manufactured and sold and used in the State of Florida, or imported into Florida from any other State of the United States. But said Act only provides for the inspection and payment of fees with respect to cement imported into the State of Florida from a foreign country. And this Court also overlooked and failed to consider that the Supreme Court of the United States has held in *Voight* v. *Wright*, 141 U. S. 68, 35 L. Ed. 638, and other cases, that a State may not under the guise of exercising its police

powers or of enacting inspection laws, discriminate against the products and industries of some of the States in favor of the products and industries of its own and other States, and that a Statute that prevents products of distant States from coming into competition upon terms of equality with products of a domestic State, is repugnant to the Constitution of the United States. That any local regulation which in terms or by its necessary operation denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and therefore void.

This Court further overlooked and failed to consider that the Federal Constitution grants the Congress of the United States the power to regulate commerce with foreign nations in precisely the same language as it does commerce among the States. That if a State Statute, injuriously discriminating against the products of another State of the Union is forbidden by the Constitution, *then a similar State Statute discriminating against goods imported from a foreign Country is equally forbidden. Cook* v. *Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015.

3. This Court further overlooked or failed to consider that this Act before the Court nowhere provides for any inspection of cement manufactured, in Florida or anywhere else in the United States. The portion of said Act providing for a minimum standard for all cement offered for sale or sold or used in Florida, and its provision that it shall be unlawful to sell or offer for sale or use in Florida any cement which does not measure up to said minimum standard, makes *no provision whatever for inspection* of such cement. Furthermore, *it provides for no levy of any inspection fee whatever upon such cement.* This Court further overlooked and failed to consider that the foregoing minimum standard provisions of said Act, as far as they go, *apply with equal force and effect to cement imported into Florida from a foreign country.* But the further provisions in said Act for the inspection and license fees affecting cement imported from a foreign country into Florida, *do not apply with equal force and*

effect, or apply at all, to cement manufactured in Florida or imported into Florida from any other State in the United States. Therefore, the Court has overlooked and failed to realize that said Act lays a burden on cement imported into the State from a foreign country that is not laid upon cement manufactured in Florida or imported from any State of the Union, and that such a discriminatory burden violates said section of the Federal Constitution.

4. This Court in citing in its opinion *Voight* v. *Wright*, 141 U. S. 68, 35 L. Ed. 638, and *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862, misunderstood and overlooked the sole ground upon which said cases were decided by the United States Supreme Court. This Court cited said cases in support of the proposition that a State may not levy an inspection fee as a revenue measure.

This Court therefore overlooked that the Statute involved in *Voight* v. *Wright* laid no inspection fee for revenue. But on the contrary, the fee was laid entirely for inspection purposes. The sole isue raised and decided by the United States Supreme Court in that case was that since the Statute required the inspection *only* of flour imported into the State of Virginia, and did not require similar inspection of flour manufactured domestically, it constituted a burden on commerce, contrary to the Federal Constitution.

Furthermore, *Brimmer* v. *Rebman*, also cited in this Court's opinion, established and applied the same, identical principle. And this Court overlooked and failed to consider, for aught its opinion shows, the application of said principle and rule to the case at bar.

Therefore, Petitioner prays that this Petition be filed and prays the Court for ten (10) days time in which to file the brief in said cause for the information and convenience of the Court.

Respectfully submitted,

(Signed) WILLARD UTLEY.

IN THE SUPREME COURT OF FLORIDA.

JUNE TERM, A. D. 1937.

Friday, November 19, 1937.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator*,

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents*.

ORIGINAL JURISDICTION MANDAMUS.

Counsel for Port of Palm Beach District having moved the Court for permission to file a Petition for Rehearing in this cause which motion has been duly considered, it is thereupon ordered by the Court that the said motion be and it is hereby denied.

A true copy. Test:

____ ____,

Clerk Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator*,

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents*.

PRAECIPE FOR WITHDRAWAL OF RESPONDENTS' PETITION FOR REHEARING

Come now Respondents in the above styled cause by their undersigned Attorney and withdraw their petition for re-

hearing in the above styled cause, this First Day of November, A. D. 1937.

Respectfully submitted,

(Signed) RICHARD P. DANIEL,
Attorney for Respondents.

IN THE SUPREME COURT OF THE STATE OF FLORIDA.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator,*

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents.*

PEREMPTORY MANDAMUS.

State of Florida to A. B. Hale, as Chairman, and E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and Constituting the State Road Department of the State of Florida:

Whereas, the Supreme Court of the State of Florida did heretofore issue alternative writ in the above styled cause, directed to the above named respondents, requiring the said respondents, as and constituting the State Road Department of the State of Florida, to show cause if any they could, why peremptory writ of mandamus should not issue as prayed in the petition filed by the relator; and the said respondents having failed to show any sufficient reason or cause why peremptory writ of mandamus should not issue as prayed in the petition of file in the above cause, this is, therefore, to command you, A. B. Hale, as Chairman, E. A. McColskey, John Hughey Faulk, Brooks W. Bateman and James W. Perkins, as and constituting the State Road Department of the State of Florida, to inspect all cement im-

ported into the State of Florida from any foreign country and sold, offered for sale, or to be used in the State of Florida, and affix thereto evidence showing that said cement has been so inspected, and collect therefor the inspection fees fixed by an Act of Legislature passed at the 1937 session and as the same is on file with the Secretary of State, and which Act is copied in full in the opinion of this court overruling and denying motion to quash.

Witness the Honorable W. H. Ellis, Chief Justice of the Supreme Court of the State of Florida, and the seal of said Court this November 19, 1937.

(Signed) G. T. WHITFIELD,
[SUPREME COURT SEAL.] *Clerk.*

IN THE SUPREME COURT OF THE STATE OF FLORIDA.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator,*

VS.

A. B. HALE, as Chairman, and E. A. MCCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents.*

PETITION FOR REHEARING.

Filed November 1, 1937.

Richard P. Daniel, Attorney for Respondents; Daniel & Thompson, of Counsel.

Come now the above named Respondents, and respectfully petition the Court to grant a rehearing and reargument of the above cause.

As grounds for this petition it is respectfully urged that this Court in its judgment has overlooked or failed to consider pertinent and vital matters in harmony with the posi-

tion taken by these Respondents in their brief and oral argument as follows:

1. In holding that said Act does not violate the Commerce Clause of the Federal Constitution (Article 1, Sec. 8), this Court overlooked and failed to consider that this Act does not require any inspection of or levy any inspection fee upon any cement manufactured and sold and used in the State of Florida, or imported into Florida from any other State of the United States. But said Act only provides for the inspection and payment of fees with respect to cement imported into the State of Florida from a foreign country. And this Court also overlooked and failed to consider that the Supreme Court of the United States has held in *Voight* v. *Wright*, 141 U. S. 68, 35 L. Ed. 638, and other cases, that a State may not under the guise of exercising its police powers or of enacting inspection laws, discriminate against the products and industries of some of the States in favor of the products and industries of its own and other States, and that a Statute that prevents products of distant States from coming into competition upon terms of equality with products of a domestic State, is repugnant to the Constitution of the United States. That any local regulation which in terms or by its necessary operation denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and therefore void.

This Court further overlooked and failed to consider that the Federal Constitution grants the Congress of the United States the power to regulate commerce with foreign nations in precisely the same language as it does commerce among the States. That if a State Statute, injuriously discriminating against the products of another State of the Union is forbidden by the Constitution, *then a similar State Statute discriminating against goods imported from a foreign Country is equally forbidden. Cook* v. *Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015.

2. This Court further overlooked or failed to consider that this Act before the Court nowhere provides for any inspection of cement manufactured in Florida or anywhere

in the United States. The portion of said Act providing for a minimum standard for all cement offered for sale or sold or used in Florida, and its provision that it shall be unlawful to sell or offer for sale or use in Florida any cement which does not measure up to said minimum standard, makes *no provision whatever for inspection* of such cement. Furthermore, *it provides for no levy of any inspection fee whatever upon such cement.* This Court further overlooked and failed to consider that the foregoing minimum standard provisions of said Act, as far as they go, *apply with equal force and effect to cement imported into Florida from a foreign country.* But the further provisions in said Act for the inspection and license fees affecting cement imported from a foreign country into Florida, *do not apply with equal force and effect, or apply at all, to cement manufactured in Florida or imported into Florida from any other State in the United States.* Therefore, the Court has overlooked and failed to realize that said Act lays a burden on cement imported into the State from a foreign country that is not laid upon cement manufactured in Florida or imported from any State of the Union, and that such a discriminatory burden violates said section of the Federal Constitution.

3. This Court in citing in its opinion *Voight* v. *Wright*, 141 U. S. 68, 35 L. Ed. 638, and *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862, misunderstood and overlooked the sole ground upon which said cases were decided by the United States Supreme Court. This Court cited said cases in support of the proposition that a State may not levy an inspection fee as a revenue measure.

This Court therefore overlooked that the Statute involved in *Voight* v. *Wright* laid no inspection fee for revenue. But on the contrary, the fee was laid entirely for inspection purposes. The sole issue raised and decided by the United States Supreme Court in that case was that since the Statute required the inspection *only* of flour imported into the State of Virginia, and did not require similar inspection of flour manufactured domestically, it constituted a burden on commerce, contrary to the Federal Constitution.

Furthermore, *Brimmer* v. *Rebman*, also cited in this Court's opinion, established and applied the same, identical

principle. And this Court overlooked and failed to consider, for aught its opinion shows, the application of said principle and rule to the case at bar.

Respectfully submitted,

____ ____,

Attorney for Respondents.

____ ____,

Of Counsel.

IN THE SUPREME COURT OF FLORIDA.

JUNE TERM, A. D. 1937.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator,*

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents.*

MOTION FOR STAY ORDER.

Come now the above Respondents, constituting the State Road Department of Florida, and represent to the Court that since the peremptory writ of mandamus was entered by this Court in this cause, ordering these Respondents to enforce the provisions of Senate Bill 760, Laws of Florida, Acts of 1937, that an interlocutory injunction has been entered by the District Court of the United States for the Northern District of Florida, composed of three judges, pursuant to Section 266 of the United States Judicial Code, in a certain cause therein pending, wherein Bimco Trading Inc., is Plaintiff, and these Respondents are Defendants, restraining these Respondents from enforcing the provisions of said Act until the further order of said United States District Court.

These Respondents further represent that they intend to appeal from the said order of the said United States District Court to he Supreme Court of the United States,

and to obtain a decision from said last named Court as to whether said Act violates any of the provisions of the Constitution of the United States.

Your Respondents further represent that it is apparent that it is impracticable and impossible for them to obey both the order of this Court and of the United States Court, and therefore, they move this Court for an order staying further proceedings and action herein, until the final decision of the Supreme Court of the United States upon the constitutionality of said Act, or until the further order of this Court.

(Signed) RICHARD P. DANIEL,
Attorneys for State Road Department.

Receipt of a copy of the foregoing motion received this 2nd day of December, 1937.

(Signed) PAT WHITAKER,
Attorney for Relator.

IN THE SUPREME COURT OF FLORIDA.

JUNE TERM, A. D. 1937.

Thursday, December 9, A. D. 1937.

STATE OF FLORIDA *ex Rel.* FLORIDA PORTLAND CEMENT COMPANY, a Corporation, *Relator,*

vs.

A. B. HALE, as Chairman, and E. A. McCOLSKEY, JOHN HUGHEY FAULK, BROOKS W. BATEMAN and JAMES W. PERKINS, as and Constituting the State Road Department of the State of Florida, *Respondents.*

ORIGINAL JURISDICTION MANDAMUS.

This cause having been submitted to the Court upon the motion of the Attorneys for the State Road Department for a Stay Order pending the appeal of the subject matter herein involved, to the United States Supreme Court in which its motion has been duly considered, it is thereupon ordered and adjudged by the Court that the said motion

be granted and that all further proceedings and actions taken pursuant to the peremptory Writ of Mandamus heretofore issued in this cause, be and the same is hereby stayed until the final decision of the Supreme Court of the United States upon the constitutionality of the act involved in this cause and until the further order of this Court.

A true copy. Test:

____ ____,

Clerk Supreme Court of Florida.

IN SUPREME COURT OF FLORIDA.

JUNE TERM, A. D. 1938.

STATE OF FLORIDA,
County of Leon, ss:

I, Glenn Terrell, Chief Justice of the Supreme Court of Florida do hereby certify that G. T. Whitfield, is Clerk of said Supreme Court of the State of Florida and that he is the custodian of and has in his possession all papers, documents and records filed in all cases and proceedings pending before said Court.

In Testimony Whereof, I have hereunto subscribed my name and caused to be affixed the seal of said Supreme Court at the City of Tallahassee, in said county and state, this 9th day of January, A. D. 1939.

GLENN TERRELL,
Chief Justice of the Supreme Court of the State of Florida.

FILE COPY

FEB 2 1939

No. 418

In the Supreme Court of the United States

OCTOBER TERM, 1938

A. B. HALE, AS CHAIRMAN, AND E. A. McCOISKEY ET AL., ETC., APPELLANTS

v.

BIMCO TRADING, INC., AND BROWARD COUNTY PORT AUTHORITY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 418

A. B. HALE, AS CHAIRMAN, AND E. A. McCOLSKEY ET AL., ETC., APPELLANTS

v.

BIMCO TRADING, INC., AND BROWARD COUNTY PORT AUTHORITY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The District Court for the Northern District of Florida filed no opinion.

JURISDICTION

The final decree of the District Court was entered on June 14, 1938 (R. 66–67). The order allowing an appeal to this Court was entered on September 6, 1938 (R. 70–71). The jurisdiction of this Court is invoked under Section 266 of the Judicial Code (28 U. S. C. 380).

QUESTIONS PRESENTED

The state statute imposes standards for cement but requires inspection and exacts an inspection fee only when the cement is imported from a foreign country. The questions are:

1. Whether the statute is valid under the commerce clause, Article I, Section 8, Clause 3, of the Constitution?

2. Whether the statute is valid under the imports clause, Article I, Section 10, Clause 2, of the Constitution?

STATUTE INVOLVED

The Florida statute, ch. 18995 of the Laws of 1937, is set out in the Appendix, *infra*, pp. 39–43.

STATEMENT

This suit was commenced by appellee Bimco Trading, Inc.,[1] in the United States District Court for the Northern District of Florida on November 4, 1937 against appellants, as and constituting the State Road Department of the State of Florida. It attacked as unconstitutional an act [2] of the State of Florida which provided, among other things, for the inspection of all imported cement and required the payment of a fee of fifteen cents per hundred pounds for such inspection. A temporary restrain-

[1] Appellee Broward County Port Authority was subsequently permitted to intervene as a party plaintiff (R. 55–63).

[2] Chap. 18995, Acts 1937, Comp. Gen. Laws of Florida, Chap. CVIII, secs. 4151 (512)–(519).

ing order was denied on November 9, 1937 (R. 38), and on the same day an order was entered convoking a statutory three-judge court (R. 38–40). Appellants, defendants below, filed a motion to dismiss the bill of complaint on November 24, 1937[3] (R. 40–41).

The fourth ground of the motion to dismiss sought to invoke Section 265 of the Judicial Code on the ground that "the granting of an injunction as prayed would have the effect of staying the proceeding now pending in the Supreme Court of Florida." The facts in this connection are as follows: A petition for mandamus was filed in the Supreme Court of Florida on July 29, 1937, by the State of Florida, *ex rel.* Florida Portland Cement Company, against appellants here, to compel execution of the statute now under consideration (R. 36). An alternative writ of mandamus was issued that day (R. 10–14, 36). Appellants filed a demurrer to the writ (R. 15–17), and after argument the Supreme Court of Florida, on October 12, 1937, entered an order overruling the demurrer (R. 17–18), and allowing appellants ten days in which to file an answer or return. An opinion was delivered by the Court on the same day (R. 18–30). See *State* v. *Hale,* 129 Fla. 588, 176 So. 577. The

[3] The original bill of complaint was amended on January 6, 1938 (R. 65), and the parties stipulated that the motion to dismiss the original bill should stand as to the amended bill (R. 64).

record as supplemented by the order of this Court of January 30, 1939, further shows that on November 19, 1937, the Supreme Court of Florida issued a peremptory writ of mandamus against appellants and that on December 9, 1937, the Supreme Court of Florida stayed further proceedings and actions pursuant to the writ of mandamus pending final decision by this Court.

On November 27, 1937, a hearing was held on the application of appellee Bimco Trading, Inc., for an interlocutory injunction (R. 54). In support of its application appellee Bimco Trading, Inc., filed affidavits showing that the customary charge of commercial testing laboratories for making engineering tests and chemical analyses of cement was about one and one-half or two cents per barrel—a barrel containing four bags or three hundred and seventy-six pounds of cement (R. 42–43, 44). The affidavit of P. H. Bates of the National Bureau of Standards was submitted in which he stated that the records of the Bureau showed that the actual cost of making examinations and tests according to established government standards of quality ranged from five cents per barrel for small lots of cement (of four hundred barrels or less) to a minimum of one and one-half cents per barrel for larger lots (R. 45–47). The effect of the statutory charge of fifteen cents per hundred pounds was shown by an affidavit setting forth the fact that appellee then had a cargo of cement on

the high seas en route to this country and inspection under the statute would cost seven thousand three hundred dollars as contrasted with the customary commercial rate of about fifteen dollars (R. 43–44).

Appellee also submitted to the District Court an affidavit of the Honorable Cordell Hull, Secretary of State, which set forth the following facts (R. 47–54): The Belgian Government has protested to the United States against the Florida statute on the ground that it violated the spirit of the Belgian Trade Agreement, concluded on February 27, 1935, pursuant to the so-called Trade Agreements Act which amended the Tariff Act of 1930 (48 Stat. 943, 19 U. S. C. 1351). That agreement granted a reduction of one and one-half cents per hundred pounds in the customs duty applicable to cement imported from Belgium or Luxemburg. In return for that and other concessions and assurances granted by the United States, the Belgo-Luxemburg Economic Union granted important advantages to the industrial and agricultural interests of the United States. The fee imposed by the Florida statute amounts to three and one-third times the customs duty currently levied by the Federal Government on cement imported from abroad and is equivalent to an additional duty of approximately thirty-five per centum *ad valorem* on such cement. If the statute were upheld, the foreign commerce of the United States would be substantially ob-

structed because approximately twenty-one per centum of all the cement imported into the United States enters at Florida ports.

After hearing and argument, in which the United States participated as *amicus curiae*, the specially constituted District Court on November 27, 1937 entered its order granting an interlocutory injunction (R. 54–55), and on December 9, 1937, issued its writ (R. 63–64). No appeal was taken from that order.

On March 8, 1938, the District Court denied appellants' motion to dismiss the bill of complaint and allowed them thirty days in which to answer (R. 65). Appellants refused to plead further and on June 14, 1938, the District Court, on motion, entered a default and final decree upon the bill of complaint taken as confessed (R. 66–67). From this final decree appellants prosecuted the present appeal (R. 67–68, 70–71).

STATEMENT OF THE INTEREST OF THE UNITED STATES

1. The United States submits this brief as *amicus curiae* because the Florida statute in question here raises issues of great public importance and threatens substantially to impair and obstruct the execution of powers conferred upon the Federal Government by the Constitution. The importance of this statute, in so far as its effect on the foreign relations of the United States is concerned, is indicated by the affidavit of the Secretary of State and

by the fact that the Belgian Government has protested against it. The importance of the statute, in so far as its effect on foreign commerce of the United States is concerned, is manifest from the fact that the so-called inspection fee amounts to three and one-third times the customs duty currently levied by the Federal Government on imported cement and is equivalent to an additional duty of approximately thirty-five percent *ad valorem* on such cement.

If the State of Florida is successful in imposing this inspection fee, it is to be anticipated that other States by similar devices will exclude other commodities now imported in foreign commerce. Whatever form those statutes may take, their practical effect will be to levy import duties upon foreign commodities and in some cases to impose a virtual embargo upon the importation of those commodities. In that event, import duties, instead of being uniform as contemplated by the Constitution, will vary from State to State. It needs no argument to show the difficulties which will confront the Department of State in its efforts to negotiate trade agreements pursuant to the congressional policy embodied in the Trade Agreements Act if those agreements may be nullified and impaired by legislative action of the various States. Congress doubtless has the power to eliminate the discriminations against and obstructions to foreign commerce which would be found in such statutes, but there is

no occasion to impose on that body the duty of condemning legislation which is forbidden by the Constitution itself. In this case, as in the countless earlier cases in which the Court has enforced the mandate of the commerce clause, the silence of Congress can have but one interpretation—the intention that commerce be free. It would be difficult to contrive congressional legislation which would preclude in advance all the forms that obstructive legislation might take; an *ad hoc* condemnation of the statutes after enactment would be an intolerably slow and unsatisfactory arrangement. Because the effectiveness of the obligations of our commercial treaties would turn upon the contingency of subsequent legislation, foreign nations could not but hesitate before entering into mutual agreements of this nature.[4] Indeed, it is perhaps not too much to say that the power of the United States to enter into international agreements and to conduct its foreign commercial relations in an orderly way is at stake. With this in mind, we might appropriately recall to the Court the language of Chief Justice Marshal in *Brown* v. *Maryland*, 12 Wheat. 419, 444–446:

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[4] The brief of appellants, indeed, seems to suggest that "the Revision and Controul of the Congress" provided by Section 10 of Article I extends only to the amount of the inspection fees (Br. 20–21). If this were the case, and Congress could not eliminate discriminations and obstructions, statutes such as that in question could work a complete and permanent frustration of the national trade policies.

* * * The oppressed and degraded state of commerce, previous to the adoption of the constitution, can scarcely be forgotten. It was regulated by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions, were rendered impotent, by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent, as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted, whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

2. The interest of the United States, as *amicus curiae*, would not ordinarily extend to the procedural problems of a particular case. Since, however, it is desirable that persons have access to the federal courts to attack state legislation which contradicts national commercial policies, it may not be amiss if we suggest two points with respect to the objections of appellants based on Section 265.

First, it hardly can be thought that Section 265 operates in these circumstances. According to the argument of appellants, if there be an initial period of inaction by the officers charged with enforcement of the statute, the State may proceed by mandamus in its own courts, and if the state court adds its voice to the voice of the legislature in imposing the duty on the officers, all persons are then barred from seeking to protect their constitutional rights by way of injunction in the federal courts. The state officers are not apt to seek review by this Court, if indeed they could, of the state court decision in the mandamus action. That proceeding should therefore not result in a complete ouster of the jurisdiction of the federal courts to give equitable relief against the challenged statute. Especially since Section 265 is not jurisdictional but merely expresses a rule of comity, designed to avoid unseemly conflicts between state and federal courts in the course of simultaneous proceedings (*Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175; *Smith* v.

Apple, 264 U. S. 274) it should not be construed to lead to such an anomalous result.

The only cases which we have found that are directly in point are *Bank of Kentucky* v. *Stone*, 88 Fed. 383 (C. C. Ky.), decided by Circuit Justice Harlan and Circuit Judges Taft and Lurton, affirmed by divided court, *Stone* v. *Bank of Kentucky*, 174 U. S. 799, and *Everglades Drainage Dist.* v. *Florida Ranch & D. Corp.*, 74 F. (2d) 914 (C. C. A. 5th). In each case, on facts closely comparable to those at bar, the court held that a mandamus action in the state court did not under Section 265 bar an equity suit to enjoin the action in a federal court.

SUMMARY OF ARGUMENT

I

It is evident on the face of the Florida statute that it discriminates against foreign commerce; the inspection and the payment of the fee, 15 cents per 100 pounds, is required only in the case of foreign commerce.

Few propositions are better settled than the rule which forbids discrimination against interstate commerce, whether the discrimination take the form of taxation or police regulation. The rule has been held equally applicable to foreign commerce.

A settled exception to the prohibition of the commerce clause against direct burdens on interstate

or foreign commerce is that which permits the State to impose inspections or regulations, and to collect fees or charges to recompense itself for their cost. It is, however, inapplicable here, because the commerce clause inspection fee to be valid can be neither discriminatory nor excessive in amount; this inspection law is condemned on both grounds.

II

The argument that the imports clause does not invalidate the statute, even if correct, offers no escape from the prohibition of the commerce clause. However, the history of the imports clause in the Federal Convention and the decisions of this Court unite to show that the statute is also invalid under this clause. It is discriminatory and its fees are more than are "absolutely necessary" to enforce the act. So, regardless of the fact that the Florida legislature legislation has called this an inspection law, this Court must declare the statute unconstitutional.

ARGUMENT

I

THE FLORIDA STATUTE IS INVALID BECAUSE IT IMPOSES AN UNDUE AND DISCRIMINATORY BURDEN ON FOREIGN COMMERCE

In the following discussion we shall show (a) that the Florida statute discriminates against foreign commerce and in favor of domestic commerce, and (b) that this discrimination, as well as the ex-

and (b) that this discrimination, as well as the excessive fees imposed, are forbidden by the commerce clause, which gives to Congress alone the power "to regulate Commerce with foreign Nations".

A. The Act Discriminates Against Foreign Commerce

It is evident from the face of the Florida statute (*infra*, p. 39) that it discriminates against foreign commerce. The preamble opens, frankly enough, with the explanation that "during the past twelve months approximately thirty per centum (30%) of all cement sold and used in Florida was manufactured in foreign countries and imported and brought into the State of Florida." Section 1, it is true, prescribes a standard of quality of general application. But there is to be inspection only of the foreign cement imported into Florida,[5] and only the imported cement is to pay the inspection fee of 15 cents per hundredweight (Sec. 2).

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[5] It cannot be argued that Section 3, providing generally for enforcement of the Act by the State Road Department, means that the Department is to enforce the general standard of Section 1 against domestic cement, thus removing some part of the discrimination against foreign commerce. In the first place, no means of enforcement are provided. Moreover, Section 3 also provides that the Department shall expend in its enforcement of the statute only the moneys collected under its provisions. Since the only fees provided are those resulting from the inspection of imports, this argument would serve only to introduce a second form of discrimination.

The complaint makes plain the extent of this discrimination.[6] The imported cement sells for $1.60 per barrel; the inspection charge would be 57 cents per barrel, and sale in a market where the domestic competitors were exempt would be impossible. The charge would amount to $9,000 per cargo, in place of the $15 now charged under the customary method of commercial inspection (R. 2–3). The size of the fee, and its impact upon the foreign commerce and the foreign relations of the United States, are graphically shown when the Florida fee of 15 cents per hundred pounds is compared with the duty of 6 cents per hundred pounds which was set in the Tariff Act of 1930 (19 U. S. C., Sec. 1001, par. 205b) and which was reduced to 4½ cents by the Belgian Trade Agreement of 1935 (49 Stat. 3680, 3691).

This discriminatory burden on foreign commerce cannot be justified. The Act advances two reasons. One, that the importation "amounts to unfair competition being forced on this great industry[7] in Florida", carries its own indictment of the statute

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[6] This appeal was taken from a default decree entered after the denial of appellants' motion to dismiss. The only question before this Court is whether or not the bill of complaint states a cause of action. In determining that question the allegations of the bill must be considered as true. *Polk Co.* v. *Glover*, 305 U. S. 5, 9; *Postal Telegraph-Cable Co.* v. *Taylor*, 192 U. S. 64.

[7] In fact, the Florida Portland Cement Company, at Tampa, is the only concern in the State which manufactures cement (R. 3).

and indicates that the legislation might in truth have been designed as a local protective tariff.

The second reason, as explained by the preamble, is that, because of the large numbers of dwelling houses and public buildings constructed with the use of cement, "it is of paramount importance to the public safety that only cement measuring up to a minimum standard should be offered for sale, sold or used in the State of Florida." But, quite plainly, if there be this paramount public interest in the quality of cement, it would extend to inspecting the 70 per cent of all cement sold which is of domestic manufacture as well as the 30 per cent which is imported.

The declaration in the preamble that "much of the foreign manufactured cement imported and brought into the State of Florida has been of inferior quality" cannot serve to justify the discrimination. We do not suggest that the finding was not made in good faith. We do not suggest, at least with this state of the record,[8] that the finding may not have basis in fact. We do insist that, even if the foreign manufactured cement were apt to be inferior in quality, which is shown by this record not to be the case,[9] no legislative finding of administrative convenience, which alone could serve as a proper explanation of the classification, can justify

[8] See *Foster Packing Co.* v. *Haydel*, 278 U. S. 1, 10.

[9] The cement imported by the plaintiff must be taken to be of the highest quality sold in Florida (R. 2).

such a burdensome discrimination against foreign commerce. Any administrative inconvenience which may result from the prohibition against classifications which unduly discriminate against interstate and foreign commerce is a small price to pay for the advantages of being a single nation.

B. A State May Not Discriminate Against Interstate or Foreign Commerce

1. *The General Rule.*—The succeeding discussion deals largely with cases which involve discrimination against interstate commerce rather than foreign commerce. But foreign commerce is plainly entitled to at least the same protection as that given interstate commerce under the power of Congress "to regulate Commerce with foreign Nations and among the several States." It has never been suggested, so far as we know, that the prohibitions implied by the commerce clause are not fully applicable to foreign commerce. The Court, in any event, has settled the question in *Cook* v. *Pennsylvania,* 97 U. S. 566, 573. There it held that the prohibition of the commerce clause, announced in cases which condemned legislation discriminating against interstate commerce, applied equally to discriminations against foreign commerce.

The guiding principles stem from *Brown* v *Maryland,* 12 Wheat. 419, 448, where the Court said that "Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power

given to congress to regulate commerce * * *." Since that decision it has been almost beyond dispute that no State could direct a tax or regulation at interstate or foreign commerce alone. The teaching of the cases is unmistakable.[10]

The rule against discrimination was applied, for example, in *Welton* v. *State of Missouri,* 91 U. S. 275, where the Court held a statute invalid which required a license from peddlers selling goods not produced in the State. Otherwise, it said (p. 281), "all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other states and countries, which existed previous to the adoption of the Constitution, might follow * * *." Similarly, in *Guy* v. *Baltimore,* 100 U. S. 434, the Court held invalid an ordinance, enacted pursuant to legislative authority, which excepted vessels carrying the produce of Maryland from the wharfage charged at the municipal wharves. The controlling rule was succinctly stated by Justice Harlan, writing for the Court (p. 439):

> no State can, consistently with the Federal Constitution, impose upon the products of

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[10] See, in addition to the cases discussed in the text, *Ward* v. *Maryland*, 12 Wall. 418; *Tiernan* v. *Rinker*, 102 U. S. 123; *County of Mobile* v. *Kimball*, 102 U. S. 691, 697; *Webber* v. *Virginia*, 103 U. S. 344; *Walling* v. *Michigan*, 116 U. S. 446; *Scott* v. *Donald*, 165 U. S. 58, 101; *Vance* v. *W. A. Vandercook Co. (No. 1)*, 170 U. S. 438, 449–450; *Darnell & Son* v. *Memphis*, 208 U. S. 113.

other States, brought therein for sale or use, or upon citizens because engaged in the sale therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory.

2. *The Commerce Clause Inspection Cases.*—Appellants do not discuss the commerce clause, but it may be supposed that they would seek to justify the Florida statute as an inspection law. It has, of course, long been established that a State, to protect the health and welfare of its citizens may impose inspections or regulations under what has been called its police power, and may also collect fees or charges to recompense itself for the cost of this regulation or for the cost of facilities used in the commerce. This exception to the implied prohibitions of the commerce clause has become settled with respect both to interstate [11] and to foreign [12] commerce.

This exception can, however, have no application here. The general rule forbidding discrimina-

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[11] *Wharf* v. *Bingaman*, 298 U. S. 407, 410; *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261, 268; *Postal Tel.-Cable Co.* v. *Richmond*, 249 U. S. 252; *Pure Oil Co.* v. *Minnesota*, 248 U. S. 158; *Foote* v. *Maryland*, 232 U. S. 494; *Savage* v. *Jones*, 225 U. S. 501, 528; *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380, 391–393; *Western Union Tel. Co.* v. *New Hope*, 187 U. S. 419; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345; *Packet Co.* v. *Keokuk*, 95 U. S. 80.

[12] *Morgan* v. *Louisiana*, 118 U. S. 455; see *Clyde Mallory Lines* v. *Alabama*, *supra*; *Patapsco Guano Co.* v. *North Carolina*, *supra*, 351.

tion against interstate commerce operates in the field of inspection laws just as it does with respect to other state legislation. In addition, the Florida statute is invalid because the inspection fee is excessive.

3. ***A Discriminatory Inspection Law is Invalid.***— We have already shown that the Florida statute is grossly discriminatory in its operation, favoring domestic commerce and crippling or destroying foreign commerce (*supra*, pp. 13–16). This means it cannot be saved on the theory that it is a police regulation to ensure safety, while the fee of 15 cents per hundredweight is designed merely to recompense the State for the cost of its administration. None of the cases in which such an act has been sustained dealt with a discriminatory measure.[13] Many of the decisions expressly state the rule as applicable only to nondiscriminatory regulations or charges.[14]

These dicta and negative implications are amply borne out in unequivocal decisions of the Court.

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[13] Any discrimination in the statute considered in *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38, discussed *infra*, pp. 23–24, was viewed as insubstantial by the Court.

[14] *Dixie Ohio Express Co.* v. *State Revenue Commission*, No. 260, this Term; *Morf* v. *Bingaman*, *supra*, 410; *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183, 186; *Interstate Busses* v. *Holyoke Ry.*, 273 U. S. 45, 51; *Hendrick* v. *Maryland*, 235 U. S. 610, 612; *Savage* v. *Jones*, *supra*, 524; *McLean* v. *Denver & Rio Grande R. R. Co.*, *supra*, 54; *Patapsco Guano Co.* v. *North Carolina*, *supra* 357; *Woodruff* v. *Parham*, 8 Wall. 123, 140.

In several cases state laws, which otherwise would have been a valid exercise of the police powers, have been held unconstitutional because they discriminated against interstate commerce.

Railroad Co. v. *Husen,* 95 U. S. 465, held invalid under the commerce clause a Missouri statute which forbade the entry of Texas, Mexican or Indian cattle between March and November of each year. The State, it was held, could "no more prohibit or regulate that [commerce] which is inter-state than it can that which is with foreign nations", and the act must fall because "The object and effect of the statute are, therefore, to obstruct inter-state commerce, and to discriminate between the property of citizens of one State and that of citizens of other States" (pp. 469, 470).

A Virginia statute rather closer to that now in question was considered in *Voight* v. *Wright,* 141 U. S. 62. It required inspection of all flour brought into the State and offered for sale, but did not require the inspection of flour manufactured in Virginia. A fee of two cents per barrel was provided to defray the costs of inspection. This Court, without discussing the inspection fee, held that the mere requirement of inspection was invalid, because (p. 66):

> The law in question is a discriminating law, and requires the inspection of flour brought from other States, when such inspection is

not required for flour manufactured in Virginia.

The Court has reached the same result in cases where the state statute did not in terms discriminate against interstate commerce, but did so as a necessary result. In *Minnesota* v. *Barber,* 136 U. S. 313, the Court considered a statute which required all cattle, sheep and swine slaughtered for human food to be inspected, in Minnesota, within 24 hours before their slaughter. The effect of the statute was virtually to exclude from the Minnesota market all meat taken from animals slaughtered in other States; it was accordingly held to be an unconstitutional burden on interstate commerce. A somewhat similar statute of Virginia made it unlawful to sell in the State meat taken from animals slaughtered 100 miles or more from the place at which the meat was offered for sale unless the meat had been inspected and approved by state inspectors; an inspection fee of one cent per pound was to be charged. It was held invalid in *Brimmer* v. *Rebman,* 138 U. S. 78. This Court said (p. 82):

> Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or se-

> cured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States.

The *Barber* and *Rebman* cases also serve to make clear that no declaration of the legislature as to the purposes of preserving the health or safety of the residents of the State will justify a discrimination against interstate or foreign commerce. The Court in the *Barber* case, speaking of the argument that inspection was adequate only before slaughter, said that if this were true "it would not follow that a statute like the one before us is within the constitutional power of the State to enact" (136 U. S. at 321). It said, in the *Rebman* case, that "The recital in the preamble that unwholesome meats were being offered for sale in Virginia cannot conclude the question of the conformity of the act to the Constitution" (138 U. S. at 81; see also p. 83).

Perhaps the case most closely in point is one recently decided by the New Hampshire court when it considered a proposed statute similar in all essential respects to that here involved. In *Opinion of the Justices,* 87 N. H. 496, it unhesitatingly condemned a bill requiring that bread and pastry made in a foreign country must be inspected and sold

under a license, while domestic bread and pastry was not so regulated.[15]

The Supreme Court of Florida has sustained the statute in *State ex rel. Florida Portland Cement Co.* v. *Hale*, 129 Fla. 588.[16] The court gave only incidental attention to the operation of the commerce clause, as opposed to the imports clause, but seems to have based its decision under the commerce clause on *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38. That case offers no support to the legislation here under attack. New Mexico, to discourage the theft of cattle (generally identified by brand marks) enacted a comprehensive series of statutes. Butchers were required to keep a record of animals slaughtered, they and all other persons

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[15] The court said (p. 499):

"The bill seeks to place burdens on the business of dealing in and selling bread and pastry made in and imported from a foreign country. If the products are made locally or in another state, they are free from the burdens. No reason suggests itself why, in the interest of public health or in other public concern, bread and pastry made in a foreign country should be inspected and sold under license while that made in this country has no need of such regulation. The purpose of the bill to discourage the importation from another country of these products is reasonably apparent. * * *

"The result is that the bill is considered to propose fatally defective legislation. By its discriminatory features it will amount to a direct regulation of foreign commerce in placing it under restrictions not applicable to other commerce in the same kind of property. * * *"

[16] The opinion is included in the present record (R. 18–30).

were required to keep the hides for 30 days to permit inspection, and a board of inspectors were to inspect slaughter houses and to report on the number of cattle slaughtered, the names of the sellers and the brand marks; an inspection fee of 3 cents was required. The act which was assailed forbade any carrier to accept for transportation beyond the territory hides which had not been inspected and tagged; a fee of 10 cents was charged for this inspection. (203 U. S. at 51–53.) The Court held that the statute was plainly designed to prevent theft and that, in view of the other statutes applicable to hides which were not shipped outside the State, there was no arbitrary discrimination against interstate commerce. Such a conclusion could not be reached with respect to the Florida statute which is here involved; the inspection and the fee relate only to cement in foreign commerce.

It seems plain enough that Florida, whatever the purposes of the legislation, must proceed within the limits set by the commerce clause. If the legislature wishes to insure against the use of inferior cement, it must make its inspection laws applicable to domestic as well as to imported cement; any other result would stifle foreign trade, the regulation of which is committed to Congress alone.

4. *An Inspection Law With Excessive Fees Is Invalid.*—It is thoroughly settled that, while the commerce clause permits inspection fees and other charges designed only to reimburse the State for

the administration of its police laws or commerce facilities,[17] these fees and charges are invalid if they exceed the reasonable cost of performing the services.[18] These decisions are applicable to invalidate the Florida statute for either of two reasons. (1) The most important of these reasons is that the admitted facts[19] charge that the fee is 60 times the actual cost of inspection under the provisions of the act and 600 times the necessary and customary cost of inspection (R. 3). (2) These facts are conclusive, but it might also be suggested that the statute in Section 3 provides that the cost of its enforcement is to be paid out of the fees collected, but it is nowhere provided that the fees collected are to be used only for this purpose. It necessarily follows that the fees collected, if there be an excess, must be paid into the general treasury. This intermingling with the general funds places the burden on the State to justify the exaction as reasonably necessary for the administration of the law.[20]

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[17] See the cases cited in footnotes 11, 12, and 14, *supra*.

[18] *Steamship Co.* v. *Portwardens*, 6 Wall. 31; *Atlantic &c. Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Postal Telegraph-Cable Co.* v. *New Hope*, 192 U. S. 55; *Postal Telegraph-Cable Co.* v. *Taylor*, 192 U. S. 64; *Phipps* v. *Cleveland Refining Co.*, 261 U. S. 449; *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183; *Ingels* v. *Morf*, 300 U. S. 290; *Great Northern Ry.* v. *Washington*, 300 U. S. 154.

[19] See footnote 6, *supra*.

[20] If, as the state court held (R. 23), "the net surplus must be accounted for to the Treasury of the United States", the result is not affected. There has been an intermingling of

Great Northern Ry. v. *Washington,* 300 U. S. 154, 162; *Ingels* v. *Morf,* 300 U. S. 290, 294, 296. This burden, of course, has not been met by the State.

It results that the burdensome charge of 15 cents per 100 pounds of cement cannot be sustained on the theory that it serves only to reimburse the State for a nondiscriminatory inspection which only incidentally affects foreign commerce. Failing that justification, it remains an unwarranted interference with and a direct burden on foreign commerce, and must therefore be held invalid.

II

THE FLORIDA STATUTE IS NOT MADE VALID BY THE IMPORTS CLAUSE BUT IS, INDEED, PROHIBITED BY THAT CLAUSE

We have shown that the statute in question is invalid because it is an undue and discriminatory burden on foreign commerce. Appellants argue that the act is valid under the imports clause. That clause, Article I, Section 10, Clause 2, provides:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treas-

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the funds prior to this accounting, and, so far as the commerce clause is concerned, this is sufficient to require the State to justify the amount of the fee.

> ury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

1. It is necessary, before discussing the operation of the imports clause in detail, to point out that even if appellants were to carry their argument that the fee is not prohibited by the imports clause, it would not follow that the act would be valid. The imports clause is not an exception from the prohibitions latent in the commerce clause, but an additional prohibition. Thus, taxes which are valid under the commerce clause, such as nondiscriminatory property taxes on goods in their original package or privilege taxes on their sale, are nonetheless invalid when applied to goods imported from foreign countries.[21] *Low* v. *Austin,* 13 Wall. 29, 34; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 519–520; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 509–512; compare *Brown* v. *Maryland,* 12 Wheat. 419, with *Woodruff* v. *Parham,* 8 Wall. 123. Since the imports clause is a second rather than the only limitation upon state power with respect to foreign commerce, the statute is not sustained merely by showing it to be valid under that clause.

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[21] While there are contrary intimations in *Brown* v. *Maryland*, 12 Wheat. 419, 449; *Voight* v. *Wright*, 141 U. S. 62; and *Foote* v. *Maryland*, 232 U. S. 494, 503, it is settled that the imports clause is directly applicable only to foreign commerce. *Woodruff* v. *Parham*, 8 Wall. 123; *Coe* v. *Erroll*, 116 U. S. 517; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345, 350; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506.

We shall, however, show that the statute is also invalid under the imports clause.

2. The clause is more complex and rather more obscurely worded than in the case of most of the other constitutional provisions. Its proper interpretation, accordingly, requires to an unusual degree that attention be paid to its genesis in the Federal Convention.

The earlier drafts of the Committee of Detail, whose work was undertaken during an adjournment of the Convention,[22] contained an absolute prohibition against a State laying a duty on imports.[23] The Committee's final report, submitted on August 6, forbade such legislation "~~until the~~ Legislature of the United States ~~can be consulted~~."[24] When the clause was discussed in convention it was twice amended. A motion to extend the prohibition to exports was carried by a bare margin.[25] In addition, Madison moved that the prohibition be made absolute, since the importing States might act in Congress to extend consent to the state import

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[22] Farrand, *Records of the Federal Convention*, I, xxii.

[23] Draft III (Farrand, 2, 135): "The S. & H. D. in C. Ass. shall have the exclusive Power of * * * levying Imposts." Draft IV (Farrand, 2, 143): "no State to lay a duty on imports". Draft IX (Farrand, 2, 169): "No State shall * * * lay any Imposts or Duties on Imports".

[24] Farrand, 2, 187. The clause itself was not changed but the consent of the national legislature was made to modify the whole of Article XIII.

[25] Farrand, 2, 442. The vote was 6 states to 5.

duties; after Sherman declared he thought Congress could be trusted the motion was defeated.[26] Sherman, apparently to soften the fears of Madison, then moved that the revenues derived from such imposts, if Congress consented, be paid to the United States.[27] Madison and Morris favored the regulation as effectually preventing imposts; others opposed for the same reason, but it was carried.[28] The Committee of Style reported the clause in substantially the form to which it had been amended in convention.[29] On September 12 Mason of Virginia moved to reconsider, because the prohibition of a duty on exports would ruin the "Staple States," which had a thoroughgoing scheme of state inspection and warehousing of their export commodities; he accordingly proposed a rather complex amendment to accomplish his purpose.[30] Madison saw no harm, and added, significantly, that the commerce clause would serve to prevent abuse; to the fears of other members that abuses might arise from the

[26] Farrand, 2, 441. The vote was 4 states to 7.

[27] The motion was to add "nor with such consent but for the use of the U. S." Farrand, 2, 442.

[28] Farrand, 2, 443. The vote was 9 states to 2.

[29] Farrand, 2, 577. See, also, the report of September 12, Farrand, 2, 597.

[30] Farrand, 2, 588. The amendment was: "provided nothing herein contained shall be construed to restrain any State from laying duties upon exports for the sole purpose of defraying the Charges of inspecting, packing, storing and indemnifying the losses, in keeping the commodities in the care of public officers, before exportation."

provision he replied: "There will be the same security as in other cases—The jurisdiction of the supreme Court must be the source of redress."[31] The amendment, revised to permit Congress to control the inspection laws, was adopted the following day.[32] On September 15, the Convention "In consequence of the proviso moved by Col. Mason," adopted a substitute provision which was carried without change into the Constitution as adopted.[33]

From this history of the clause four conclusions emerge: (1) The imports clause was primarily designed to give a certain protection, in addition to that of the commerce clause, against the seaport States laying tribute on those States which could not themselves import goods.[34] (2) The provision that "the net produce shall be for the use of the treasury of the United States" was intended to be applica-

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[31] Farrand, 2, 588–589. He was, however, not at that time sure the Court had power to declare state acts invalid (*id.*, 589).

[32] Farrand, 2, 605. The amendment, adopted by a vote of 7 states to 3, read: "Provided that no State shall be restrained from imposing the usual Duties on produce exported from such State, for the sole purpose of defraying the charges of inspecting, packing, storing, and indemnifying the losses on such produce, while in the custody of public Officers: but all such regulations shall, in case of abuse, be subject to the revision and controul of Congress."

[33] Farrand, 2, 624.

[34] See, e. g., in the Convention, Madison (Farrand, 2, 441, 442) and Morris (*ibid.*, 442); Madison's unfinished preface to the debates (*ibid.*, III, 547–548); *Cook* v. *Pennsylvania*, 97 U. S. 566, 574.

ble only when the Congress had given its consent to the impost or duty. (3) The inspection laws contemplated related primarily to export inspection and warehousing and were not considered to give a power to burden the flow of foreign commerce.[35] (4) It seems to have been contemplated even at that time that this Court would have power to set aside state statutes which infringed the clause.[36]

3. Appellants, however, challenge the power of this Court to declare invalid an improper inspection law. This challenge, of course, cannot reach the power of the Court under the commerce clause, which we have discussed in the preceding point. But it is unfounded even under the imports clause.

The Court has twice noted the suggestion of Justice Bradley, sitting on circuit, that Congress had exclusive power to annul improper inspection laws.[37] But, even in these cases it has proceeded to examine the validity of the inspection laws on

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[35] An elaborate list of state inspection laws in force before and shortly after the adoption of the Constitution is found in *Turner* v. *Maryland*, 107 U. S. 38, 51–54; it supplements a list contained in the argument of counsel in *Gibbons* v. *Ogden*, 9 Wheat. 1, 119–123.

[36] Madison's statement to that effect, it is true, was made before insertion of the provision that Congress should have power to revise and control the inspection laws. But it is hardly to be thought that this additional safeguard eliminated one already present.

[37] *Neilson* v. *Garza*, 17 Fed. Cas. No. 10,091 (C. C. E. D. Tex.); noted in *Turner* v. *Maryland*, 107 U. S. 38, 55; *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345.

their merits. Not since *Brown* v. *Maryland,* 12 Wheat. 419, could it be doubted that the power of Congress to control state imposts and duties did not exclude this Court, in the silence of Congress, from declaring them illegal.[38] The Court has in several cases considered and answered on the merits arguments that inspection laws were invalid under the imports clause,[39] and in *People* v. *Compagnie Generale Transatlantique,* 107 U. S. 59, it declared invalid a law for the inspection and health regulation of immigrants, coupled with a fee, as an improper inspection law. If more be needed, it is sufficient to note that the Court has pointed out that the problems of judicial review under the imports clause are substantially the same as those under the commerce clause,[40] where this Court has undoubted power to declare void an inspection law relating to interstate or foreign commerce.[41]

It seems plain enough, therefore, that the Court in the silence of Congress has full power to strike

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[38] See *Low* v. *Austin,* 13 Wall. 29; *Cook* v. *Pennsylvania,* 97 U. S. 566; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Anglo-Chilean Corp.* v. *Alabama,* 288 U. S. 218.

[39] *Cooley* v. *Board of Wardens,* 12 How. 299, 314; *Turner* v. *Maryland,* 107 U. S. 38; see *Foote* v. *Maryland,* 232 U. S. 494, 503.

[40] *Great Northern Ry.* v. *Washington,* 300 U. S. 154, 164; *Foote* v. *Maryland,* 232 U. S. 494, 504; *Anglo-Chilean Corp.* v. *Alabama,* 288 U. S. 218, 225; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 296; see *Patapsco Guano Co.* v. *North Carolina,* 171 U. S. 345, 351.

[41] See *supra,* pp. 20–22, 25.

down the Florida statute under the imports clause as well as under the commerce clause. We submit that the power should here be exercised to declare the statute invalid under both clauses because it is discriminatory and because the fees are excessive.

4. We have shown that the statute is discriminatory and that it is accordingly invalid under the commerce clause (*supra*, pp. 13–24). By the same token, its discrimination against foreign commerce takes it outside the exemption for inspection laws which is found in the imports clause.

On principle, it is clear that discriminatory inspection laws are a contradiction of the purposes of the Constitution. By this device, quite as effectively as by direct tariff legislation, the States would have full power to stifle foreign commerce and to develop their own protected industries. The present case offers an illuminating example. The Tariff Act of 1930 imposed a duty on cement of 6 cents per 100 pounds (19 U. S. C. Sec. 1001, par. 205b). On May 1, 1935, this duty was reduced to 4½ cents pursuant to the Belgian Trade Agreement; Belgium, in return for this and other concessions, granted reduced duties and other valuable advantages with respect to exports from this country (49 Stat. 3680, 3691, 3717). On June 5, 1937 the Florida statute was enacted, and imposed an inspection fee of 15 cents per 100 pounds on foreign cement. If it were sustained, it is clear

enough that the several States could be the ultimate arbiters of the national tariff policy.

A nondiscriminatory inspection statute, on the other hand, imposes no such obstacle to foreign trade. Foreign and domestic cement could still compete in the Florida markets, each in relation to the other unaffected by the cost of the inspection fees, which would burden the competitors equally. Neither could so substantially undersell the other as to drive it out of the market. The price of cement would probably have to be raised, but any diminution in the market would affect foreign and domestic cement equally.

This Court has never considered a discriminatory inspection law under the imports clause. But in *Brown* v. *Maryland,* 12 Wheat. 419, it declared a discriminatory license tax on importers to be invalid under that clause, although the opinion of Chief Justice Marshall did not go on the ground of discrimination.[42] *Cook* v. *Pennsylvania,* 97 U. S. 566, held invalid a gross receipts tax directed at the proceeds of the sale of foreign goods at auction; the opinion rests at least in part on the discriminatory nature of the tax. The Court said (p. 573):

> If a tax assessed by a State injuriously discriminating against the products of a State

[42] A dissenting opinion has since explained the case in terms of discrimination. *Anglo-Chilean Corp.* v. *Alabama,* 288 U. S. 218, 238 (per Cardozo, J., Brandeis and Stone, J. J., concurring); the majority opinion did not differ on this point.

> of the Union is forbidden by the Constitution, a similar tax against goods imported from a foreign State is equally forbidden.

And in *Voight* v. *Wright*, 141 U. S. 62, the Court seems to have treated a statute discriminating against interstate commerce as presenting a question under the imports clause and held (p. 66) that "without passing on the general right of the State to inspect imports * * * the law in question is a discriminating law" and therefore invalid.

Finally, as indicated in the quotation from the *Cook* case, the cases which invalidate an inspection law which discriminates against interstate commerce (*supra*, pp. 20–22) are equally applicable under the imports clause. Its prohibitions are stricter than those of the commerce clause (*supra*, p. 27), and the rule against discrimination, since there are the same imperative reasons of policy, would apply *a fortiori* under the imports clause.

5. The second reason why the Florida statute is invalid under the imports clause is that its inspection fees are unreasonably high. We have shown that they must be taken to be from 60 to 600 times the cost of inspection, and that their excessive nature is sufficient to prevent them from being saved by the exception of inspection fees from the prohibitions of the commerce clause (*supra*, pp. 24–26). Again, that rule must apply *a fortiori* in the case of foreign commerce, for the Constitution expressly limits the allowable inspection fees to those that are "absolutely necessary."

It is no answer to say that, under the terms o
the imports clause, the excess will be paid into th
Treasury of the United States. That provision wa
inserted, as we have shown (*supra,* pp. 28–29), no
to constitute an authority for excessive fees, in con
tradiction to the other requirements of the clause
but to provide an additional safeguard against th
day when Congress might consent to the states lay
ing imposts or duties.

We advance this ground of invalidity under th
imports clause, and the related ground under th
commerce clause (*supra,* pp. 24–26) in order to af
ford this Court the benefit of a full analysis of th
issues presented. However, we wish to add tha
from the point of view of the national interests o
the United States—the basis for our participatio
in the presentation of this cause—the significan
question here involved is the power of the States t
control foreign commerce for sectional purposes i
a manner not contemplated by the Constitution
Although a fee largely in excess of the cost of in
spection is naturally more burdensome than a mor
moderate one, the factors which determine competi
tive advantages in commerce are in no way relate
to the expenditures required to carry out particula
types of inspection. On the other hand, any fee
whether or not immoderately high, which is appli
cable only to imports may in many cases disrup
commerce. Furthermore, the delays and uncer

tainty necessarily attendant upon determining the reasonableness of charges by the uncertain results of specific Federal judicial decisions [43] would themselves constitute an undue burden on our foreign trade.

6. Finally, it may not be amiss to mention cases which have intimated that a valid inspection statute must be enacted *bona fide*, and not as a pretext to accomplish forbidden results. See *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59, 63; *Railroad Co.* v. *Husen*, 95 U. S. 465, 473; *Postal Telegraph-Cable Co.* v. *Taylor*, 192 U. S. 64, 72. The rule has been applied in cases which are perhaps more debatable than that presented here. But it is a dangerous doctrine which rests decision upon speculation as to the motives of a legislature. Particularly with a record so unsatisfactory as the present, we wish expressly to disclaim reliance upon standards so intangible as the supposed state of mind of the legislature.

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[43] The telegraph license and inspection cases, under the commerce clause, offer an apt example of the vagaries of juries, counsel and courts on this question. A fee of $1 per pole and $2.50 per mile was held valid in *Western Union Tel. Co.* v. *New Hope*, 187 U. S. 419. The same fee was held invalid in *Atlantic and Pacific Tel. Co.* v. *Philadelphia*, 190 U. S. 160; *Postal Telegraph-Cable Co.* v. *New Hope*, 192 U. S. 55; and *Postal Telegraph-Cable Co.* v. *Taylor*, 192 U. S. 64. A fee of $2 per pole, apparently substantially higher, was held valid in *Postal Tel.-Cable Co.* v. *Richmond*, 249 U. S. 252.

CONCLUSION

The court below had jurisdiction to entertain this action, and the challenged statute is an undue and discriminatory burden on foreign commece. It is, therefore, respectfully submitted that the decision of the court below should be affirmed.

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FEBRUARY 1939.

APPENDIX

Florida Laws of 1937, Senate Bill No. 760; Chapter 18995 of Acts of 1937; Comp. Gen. Laws of Florida, ch. CVIII, secs. 4151 (512)–(519):[1]

"AN ACT Providing for the Fixing of a Minimum Standard for all Cement Offered for Sale, Sold or Used in the State of Florida and to Authorize and Empower the State Road Department of the State of Florida to Write Rules and Regulations for the Effectual Enforcement of this Act; Providing for the Inspection of all Cement Imported and Brought into the State of Florida from any Foreign Country and Providing for an Inspection Fee to be Paid for the Inspection of all Cement Imported and Brought into the State of Florida from any Foreign Country and Offered for Sale, Sold, or to be Used in the State of Florida; Providing Penalties for the Violation of any of the Provisions of this Act as well as any Rule or Regulation Promulgated by the State Road Department; and Providing for the Enforcement of the Provisions of and Regulations made in Pursuance of this Act.

"WHEREAS, during the past twelve months approximately thirty per centum (30%) of all cement sold and used in Florida was

[1] The statute has not been printed in the official session laws. The version given by the Supreme Court in *State* v. *Hale*, 129 Fla. 588, 591–594, does not wholly agree with that of the Compiled General Laws. We have, accordingly, adopted the version used in the brief of the Attorney General of the State.

manufactured in foreign countries and imported and brought into the State of Florida, and,

"WHEREAS, in view of the fact that large numbers of dwellings, apartment houses, hotels and public buildings are constructed of cement or cement forms an integral part of the construction thereof, and,

"WHEREAS, it is of paramount importance to the public safety that only cement measuring up to a minimum standard should be offered for sale, sold or used in the State of Florida, and,

"WHEREAS, much of the foreign manufactured cement imported and brought into the State of Florida has been of inferior quality, and

"WHEREAS, the importation and sale or use of foreign cement not only jeopardizes public safety but amounts to unfair competition being forced on this great industry in Florida,

"THEREFORE:"

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

SECTION 1. That the State Road Department of the State of Florida is hereby authorized and required to fix a minimum standard for all cement offered for sale or sold or used in the State of Florida: said standard to be fixed by said State Road Department shall be the standard now in force and used by it in the purchase and use of cement in the construction of public highways which said standard of cement was set up by the American Society of Testing Materials and approved by the United States Bureau of Public Roads for highway construction; and said standard is hereby fixed

and designated as a minimum for all cement offered for sale or sold or used in the State of Florida and it shall be unlawful for any person, persons, association of persons, firm or corporation to sell, offer for sale or use in the State of Florida any cement in the construction of any hotel, apartment house, rooming house, dwelling or public building of any kind or character which does not measure up to the minimum standard herein fixed.

SEC. 2. It is hereby made the duty of the State Road Department to inspect all cement imported or brought into the State of Florida from any foreign country and sold or offered for sale or to be used in the State of Florida, and no cement imported and brought into the State of Florida from any foreign country shall be sold, offered for sale or used in the State of Florida until the same has first been inspected by the State Road Department and a tag or other evidence showing such inspection shall be affixed to said cement, or the container thereof, showing that it has been so inspected or approved; and it shall be unlawful for any person, firm, association of persons, or corporation to sell, offer for sale or use in the State of Florida any cement imported or brought into the State of Florida from any foreign country before such inspection has been made by the State Road Department and such cement approved as herein set out and until there has been paid an inspection fee to the State Road Department of fifteen cents (15¢) on each one hundred pounds or fraction thereof; said fee so required to be paid for inspection of cement manufactured in a foreign country and imported and brought into the State of Florida shall be paid to the State Road Department and said

inspection fee is required to be paid as inspection fees on cement imported and brought from foreign countries into the State of Florida.

SEC. 3. The State Road Department is hereby authorized to employ all field and other agents and clerical assistance at such times and periods as may enable it to enforce the provisions of this Act, and is hereby authorized to fix their compensation and said State Road Department is hereby authorized to purchase and install such facilities from time to time as it may deem necessary to make fully effectual the provisions of this Act. The State Road Department shall use and expend in enforcing this Act only monies derived and collected hereunder.

SEC. 4. Said State Road Department is hereby authorized and empowered to promulgate any and all reasonable rules and regulations that it may deem necessary and proper for the proper administration and enforcement of this Act and said rules and regulations shall have the force and effect of law.

SEC. 5. It shall be unlawful for any person to obstruct or resist any authorized agent or inspector designated by the State Road Department while such person is in the performance or discharge of any duty imposed upon, authorized or required under the provisions of this Act, or by any rule or regulation adopted as provided hereunder.

SEC. 6. Any person who shall violate any of the provisions of this Act or shall do or commit any act herein declared to be unlawful or violate any rule or regulation made or promulgated by the State Road Department by virtue of the authority herein, shall be punished by a fine of not more than $2500.00. or imprisonment in the county jail for not

more than 12 months, or both in the discretion of the court.

SECTION 7. This law shall be construed as an Act intending to secure public safety of the people of the State of Florida.

SECTION. 8. The State Road Department is hereby authorized to designate and utilize the services of the several officers and inspectors of the Health Department, Hotel Commission of the State of Florida, as well as any and all other duly authorized and legally constituted officials who are vested with police power, in order to enforce and carry out the provisions of this Act in all particulars, and it shall be the duty of all such inspectors and other officials to comply with the orders and requests of said Road Department in connection with the enforcement of this Act, without any additional compensation than that already being paid such inspector or officials, and refusal so to do on the part of any inspector or official shall constitute legal and sufficient grounds for removal from office.

SECTION 9. In addition to other remedies provided for in this Act, the State Road Department is hereby authorized to proceed in any of the courts of this State by injunction to restrain any threatened continued violation of this Act, and it shall be the duty of each State Attorney, County Prosecuting Attorney, and of the Attorney General, to assist in the enforcement of the provisions of this Act upon the request of the State Road Department.

SECTION 10. All laws and parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed.

SECTION 11. This Act shall take effect upon its becoming a law.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 418.—October Term, 1938.

A. B. Hale, as Chairman, and E. A. McColskey et al., etc., Appellants,
vs.
Bimco Trading, Inc., and Broward County Port Authority.

On Appeal from the District Court of the United States for the Northern District of Florida.

[February 27, 1939.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The case is here on appeal, under Section 266 of the Judicial Code (28 U. S. C. § 380), to review the final decree of a three-judge District Court enjoining appellants, constituting the State Road Department of Florida, from enforcing against appellees relevant provisions of a Florida statute. Acts 1937, c. 18995, Fla. Comp. Gen. Laws, c. CVIII, § 4151 (512)-(519). The statute provides for the inspection of all imported cement and the payment for such inspection of a fee of fifteen cents per hundred pounds. A motion to dismiss the bill having been overruled and appellants having elected to stand on the bill, a final decree was duly entered.

At the threshold, a challenge to the jurisdiction of the District Court must be met. It derives from Section 265 of the Judicial Code (28 U. S. C. § 379), for it is claimed that the injunction in effect stayed proceedings in the Supreme Court of Florida. Disposition of this claim entails a quick narrative of the course of litigation disclosed by the record.

On July 29, 1937, a petition for mandamus was filed in the Supreme Court of Florida by the State of Florida ex rel. Florida Portland Cement Company to compel appellants, members of the State Road Department, to enforce the statute in question, and on the same day an alternative writ of mandamus was issued. Appellants' demurrer, raising the constitutionality of the statute, was overruled on October 12, 1937. *State* v. *Hale*, 129 Fla. 588. A peremptory writ of mandamus, on November 17, 1937, directed appellants to enforce the statute. Meanwhile, on November 4, 1937, appellee Bimco Trading, Inc. filed its bill of complaint in this suit to enjoin the enforcement of the statute as forbidden, *inter alia*,

by Article I, § 8, cl. 3, and Article I, § 10, cl. 2, of the Constitution. On November 27, 1937, the District Court granted an interlocutory injunction restraining appellants from enforcing the statute. Thereafter, appellants moved the Supreme Court of Florida to stay the mandamus proceedings pending an appeal to this Court from the order of the District Court, and on December 9, 1937, the Florida court ordered "that all further proceedings and actions taken pursuant to the peremptory Writ of Mandamus heretofore issued in this cause, be and the same is hereby stayed until the final decision of the Supreme Court of the United States upon the constitutionality of the act involved in this cause and until the further order of this Court." This cause was then prosecuted with dispatch. On March 8, 1938, appellants' motion to dismiss, which had been filed on November 24, 1937, was overruled, and, appellants refusing to plead over, the District Court, on June 14, 1938, entered a final decree permanently enjoining the enforcement of the statute.

To invoke Section 265 in these circumstances is to assert that a successful mandamus proceeding in a state court against state officials to enforce a challenged statute, bars injunctive relief in a United States district court against enforcement of the statute by state officials at the suit of strangers to the state court proceedings. This assumes that the mandamus proceeding bound the independent suitor in the federal court as though he were a party to the litigation in the state court. This, of course, is not so. *Chase National Bank* v. *Norwalk,* 291 U. S. 431, 441.

Appellants are in effect contending that no proceedings are here available to bring the constitutionality of the Florida statute before this Court, once the state court directed its enforcement. The Supreme Court of Florida itself manifested no such strangling conception of Section 265. It did not deem the proceedings initiated below as a denial of the right of way of a state court through an obstructive exercise of authority by a United States court. On the contrary, in staying "all further proceedings and actions" until this Court had finally passed upon its constitutionality, the Supreme Court of Florida recognized the propriety of the present proceedings as an orderly mode for invoking the ultimate judicial voice on constitutional issues. Therefore, Section 265 has no relevance here. That provision is an historical mechanism (Act of March 2, 1793, 1 Stat. 334, 335) for achieving harmony in one phase of our complicated federalism by avoiding needless

friction between two systems of courts having potential jurisdiction over the same subject-matter. *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 183. The present record presents no occasion for bringing this safeguard into play.

We turn, therefore, to the merits.

After reciting that "during the past twelve months approximately thirty per centum (30%) of all cement sold and used in Florida was manufactured in foreign countries and imported"; that cement is "an integral part of the construction" of "large numbers" of buildings; that "much of the foreign manufactured cement . . . brought into the State of Florida has been of inferior quality"; that "the importation . . . and use of foreign cement not only jeopardizes public safety but amounts to unfair competition being forced on this great industry in Florida", the legislature of that State, in 1937, enacted the statute in controversy. Section 1 authorizes the State Road Department of Florida "to fix a minimum standard for all cement offered for sale or sold or used" within the State. Section 2 enforces obedience to standards of quality thus to be set by the Department by provisions for inspection and for exaction of an inspection fee of fifteen cents per hundred weight. It is this section which gives the statute teeth. But this section—the scheme for inspection and for the inspection fee—applies only to "cement imported or brought into the State of Florida from any foreign country . . . ." The statute thus renders the 70% domestic cement immune from its requirements of inspection and its attendant fee. According to the uncontested allegation of the bill of complaint, this inspection fee is "sixty times the actual cost of inspection." Apart from this allegation, the Government, appearing as *amicus* and more particularly on behalf of the national interest represented by the Trade Agreements Act (48 Stat. 943; 19 U. S. C. § 1351), gives perspective to the size of the fifteen cent fee by comparing it with the duty of six cents per one hundred pounds fixed by the Hawley-Smoot Act of 1930 (46 Stat. 590, 602; 19 U. S. C. § 1001, par. 205(b)), and with the duty of four and one-half cents fixed by the Belgian Trade Agreement of 1935 (49 Stat. 3680, 3691; 19 U. S. C. § 1351).

As grounds for this discrimination in the incidence of an obviously onerous exaction as between foreign and domestic cement, the preamble of the statute states that "it is of paramount importance

to the public safety that only cement measuring up to a minimum standard should be offered for sale, sold or used in the state of Florida," and that the importation "amounts to unfair competition being forced on this great industry in Florida." So far as public safety demands certain standards in the quality of cement, such safety is dependent on assurance of that quality by appropriate inspection no less of the 70% domestic cement than of the 30% obtained from abroad. That no Florida cement needs any inspection while all foreign cement requires inspection at a cost of fifteen cents per hundred weight is too violent an assumption to justify the discrimination here disclosed. The other justification—the competitive effect of foreign cement in the Florida market—is rather a candid admission that the very purpose of the statute is to keep out foreign goods. The Supreme Court of Florida gives no reason resting in local conditions for what appears to be a transparent discrimination in the imposition of heavy inspection fees as between imported and domestic cement, and none has been offered by appellants. The context of a particular statute may justify distinctive treatment of phases of interstate or foreign commerce. The circumstances may negative apparent discrimination in the difference of treatment. Such was the situation in *McLean* v. *Denver & Rio Grande R. R. Co.*, 203 U. S. 38, referred to by the Florida Supreme Court. But this is not that kind of a case. According the statute every presumption of validity, no reasonable conjecture can here overcome the calculated discrimination against foreign commerce.

Such assumption of national powers by a state has, ever since March 12, 1827 (*Brown* v. *Maryland*, 12 Wheat. 419), been found to be in collision with the Constitution. It can never be pleasant to invalidate the enactment of a state, particularly when it bears the imprimatur of constitutionality by the highest court of the state. But it would not be easy to imagine a statute more clearly designed than the present to circumvent what the Commerce Clause forbids. *Cook* v. *Pennsylvania*, 97 U. S. 567; *Voight* v. *Wright*, 141 U. S. 62. This makes it unnecessary to consider the objections urged under Article I, § 10, cl. 2.

The decree of the District Court is

Affirmed.